Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

John F. Fultz
Petitioner,
Vs.

ABB POWER T&D, COMPANY, INC.,
Now known as
ASEA BROWN BOVERI, Ltd.,
WESTINGHOUSE ELECTRIC, CORPORATION.,
Now CBS CORPORATION,
And MONSANTO COMPANY.
Respondents

On Writ Of Certiorari to The United States Court Of Appeals For The Seventh Circuit

PETITION For WRIT Of CERTIORARI

Petitioner, *Pro Se,*
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11 cpp

QUESTIONS PRESENTED

1. Does Respondents, the Southern District Court of Indiana, Indianapolis Division and the Seventh Circuit Court of Appeals applying of the Exclusive Remedy Provision of Worker's Compensation Act, Occupational Disease Act and a Sophisticated Bulk Purchaser Defense.

(a). Preempt conflicting State Law and divergent Court Decisions

(b). Preempted Constitutional Sovereignty, a deprivation of rights under color of law and/or equal rights under law.

(c). Supercede, Federal, Health and Safety Act's

2. The Seventh Circuit Court of Appeals unpublished order, Per Curium, Affirmed, The Southern District Court of Indiana Indianapolis Division, Granted Motion to Dismiss, Granted Motion for Summary Judgment,

(a). A denying of justice and/or a Continuance of with holding toxic chemical Information from Medical and Public review, including statutory and legal principles on the environmental impacts of Petitioners chemical injury.

(b). Where legal issues are in dispute, does the procedures utilized in the Seventh Circuit's award of motion to dismiss and summary judgment by unpublished order cause a denial of due process?

3. Did the Lower Courts fail to question and/or "omit" preconditioned statutory duties in (WC Act), and the (OD Act), A complete Act of Written Indiana Legislation.

(a). And does the Southern District Court of Indiana, Indianapolis Division and Seventh Circuit Court of

Appeals, review of Petitioners Cause "omit " the State of Indiana and Respondents Statutory duties.

4. Did Respondents, work place misconduct that caused injury and death constitute an overt act, while using and/or "generating" uncontrolled levels of Polychlorinated Biphenyl's with Ionizing Pyrolytic Radiation in a Transformer Manufacturing "enterprise," from 1961 through 1998, concealing and misrepresenting to Petitioner and fellow employees Respondents Statutory Health Care Duties, for State and Federal Health, including Safety Act's of Congress on the uses of Polychlorinated Biphenyl's in Respondents Muncie Indiana Transformer Facility?

5. Are the Respondents continued participation in interstate commerce with the use's of Polychlorinated Biphenyl's in Manufacturing and Repair of Electrical Transformers breaching Statutory Duties of Health and Safety Standards, thus constituting an illegal egregious lack of concern to federal legislative Act's, through a Web Page on the *World Wide Web Internet*, and is this an issue of continued importance for public health?

6. Why did not the Adjudicatory proceedings of Seventh Circuit Court of Appeals review, not answer Federal Questions as Per Docket ?

7. What are the Seventh District Findings of Fact and Conclusions of Law, for their Order Affirming the Respondent's Motion Granting Summary Judgment, and Motion to Dismiss

(a). Does the issues utilized in the Seventh Circuit's calculation of not answering Federal Questions cause a conflict with the States statutory construction or application of (WC Act) & (OD Act)?

(b). Does Respondents inverting the burden of proof by destroying and fraudulent concealment from the Lower Court's vital information on PCBs prevent the Petitioner from crucial elements of his injury claim?

8. Did the Federal Toxic Substances Control Act, Clean Water Act, the Clean Air Act and the Resource Conservation and Recovery Act?

(a) Preempt; the State of Indiana's Exclusive Remedy Provision of Worker's Compensation Act, Occupational Disease Act and The Sophisticated Bulk Purchaser Defense as a mater of Law.

9. Did Respondents give and/or volunteer fraudulent facts and misrepresenting for their uses of high levels of uncontrolled Polychlorinated Biphenyl's in the Lower District Courts Adjudicatory proceedings, for a Muncie Indiana Transformer Facility.

10. Does The National Environmental Policy Act of 1969, Preempt; the State of Indiana's Exclusive Remedy Provision of Worker's Compensation Act, Occupational Disease Act and The Sophisticated Bulk Purchaser Defense.

11. Did the Respondents misrepresentation and breach of fiduciary duty, along with the Respondents violation of numerous State, Federal Health and Safety Statutes constitute a continued impediment and/or a

hindering of the due course of justice, with intent to deny the Petitioner and fellow employees equal protection of the law,

Under Claim Of Unconstitutionality,

12. Does Respondents uses of False Claims to State and Federal Government Agencies for high concentrations of uncontained Polychlorinated Biphenyl's in a Transformer manufacturing environment in Muncie Indiana constitute a
Civil (RICO) ?

Does the Respondents False Claims violating Federal Health and Safety Statutes to the injury of Petitioner and fellow employees, in the using of a congressionally banned uncontained chemical Polychlorinated Biphenyl's in a transformer manufacturing facility constitute a Civil (RICO)?

And does Respondents False Claims and Civil (RICO), for the uses of high concentrations of uncontained Polychlorinated Biphenyl's to the violation of State and Federal Statutory Duties for Petitioners adverse chemical injury constitute a legal tort issue, and did the Lower Court's Adjudicatory proceedings circumvent issue's of public importance for an **"ongoing "**

PCB Conspiracy and ***"cover-up"*** for a Muncie Indiana, ***Toxic Transformer Facility.***

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Appendix H; The United States District Court Southern District of Indiana Indianapolis Divison, IP 97 - 2034 -C - B/S GRANTED Monsanto's Summary Judgment, on May 3, 1999

Appendix I; COMPLAINT In The Delaware Superior Court, of Defendant's Notice of Removal, December 1, 1997

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Pro Se, John F. Fultz Respectfully requests that a writ of certiorari issue to review the judgment of the Seventh Circuit Courts Unpublished Order, Decided March 8, 2000, and pray for the opportunity in this Writ of Certiorari for the advancement of judicial appeal under a continued claim of **Unconstitutionality**,

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JURISDICTION

Jurisdiction to review the final judgment of the Seventh Circuit Courts Denying petition for Rehearing En Banc entered on May , 8, 2000 is conferred by 28 U.S.C. 1254(1); i.e.., in that petitioner raised Federal Constitutional challenges to the Civil Injunction at issue in the Lower Courts bellow.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Appellants petition arises under the United States Constitution, particularly under the provisions of Article I §§ 8,9, and 10; Article V; and of the First, Fourth, Ninth, Tenth, and Fourteenth Amendment
to The Constitution, questioning under public interest Acts of Congress, for Federal, State Health and Safety Laws, 28 U.S.C. § 1253, Direct appeals from decisions of three-judge courts. As Plaintiff Appellants issues

concerning this Petition involves Statute's for False Claims and Civil RI CO in that the Appellee Defendants conspired and engaged in "willful" deceptive conduct to the Lower Court's for the Furtherance of a "Polychlorinated Biphenyls Conspiracy." Authority for this petition is given to The United States Supreme Court for a Criminal and Civil Standard of Evidence, Established under,

Racketeering and Corrupt Organizations Act, "CIVIL RICO" Act, codified at 18 U.S.C.A. §§ 1961-1968, Corrupt Organizations, Title IX of the Organized Crime Control Act of 1970, Act of October 15, 1970, P. L . 91-452, **"any person injured in his business or property"** by reason of a RICO violation. See; 18 U.S.C. §1964 (c).

False Claims Act ("FCA Act"), 1131 U.S.C. §§ 3729-33 (1988 & Supp. V 1993). A false or fraudulent claim includes any claim based upon a false statement or record Sec. 1131 U.S.C. § 3729 (a) (1988), A false claim is knowingly presented;

The National Environmental Policy Act of 1969, as amended; (Pub. L. 91-190, 42 U.S.C. 4321 - 4347, January 1, 1970 as amended by Pub. L. 94-52, July 3, 1975, Pub. L. 94-83, August 9, 1975, and Pub. L. 97-258, § 4 (b), Sept. 13, 1982), Toxic Substances Control Act, 15 U.S.C. 2601- 2671 et seq., (TSCA) Federal legislation, Federal Hazardous Substance Act, 15 U.S.C. 1261- 1278 Toxic Substances Control Act 15 U S C 2601 Public Law 94-469 - Oct. 11, 1976, 90 STAT. 2025 (e) **Polychlorinated Biphenyls**, (A), (B), (2) (A), (B) The published title, **"PCB Ban"** Source; Federal Register, Vol. 44, No. 106 Part VI

(May31, 1979), pp. 31514-31568; March 10, 1981, pp. 16090-16098.

This gives statutory authority to The United States Attorney General for a Comprehensive Investigation into an internal criminal and civil conspiracy relationship between Westinghouse/ABB and Monsanto, under Fed. R. App. P., Circuit Rule 44

Invitation to the Solicitor General from the Supreme Court, for "*Amicus Curiae*" on merits may be helpful for legal Decisions and application of law involving issues of economic crimes for Public Health and Safety.

Prima facie evidence on Appellants Criminal Exhibits, Points and Authorities for State and Federal Administrative Agencies non-enforcement of Act's of Congress, thus gives questions to the Constitutionality of that Act of Congress, (*PCB Ban*, a pretext, and/or a Deceptive Appearance under Color of Congressional Law), 28 U.S.C. § 2101 (a), 29 U.S.C. 651 (a), (b), 1-13

STATEMENT OF THE PETITION

COMES NOW, Appellant, Pro Se, John F. Fultz
In a continued action of pathological impairing for chemical injuries, endeavoring to persevere Appellee Defendant's intentional chemical tort, continued acts of false claims and overt acts of racketeering under a misrepresented State action. Appellant ask leave of the Seventh Circuit Court to petition, for a legal redress of

this personal injustice, and for the opportunity to the advancement of judicial appeal under, Under Fed. R. App. P., Circuit Rule 53. For Appellees ***Continuance Of Withholding Medical Information.***

Petitioner, requests The United State Supreme Court as to declaratory judgments of the Lower Court's for relief from, The Seventh Circuit Court's unpublished Order, only recognizing one Section of Fed. R. App. P., Circuit Rule 53, (d), (1),(2),(3).
The Seventh Circuit Court's, Order " Omitted"
"Fed. R. App. P., Circuit Rule 53, (a), (b), (1),(i),(ii). (2) (i),(ii),(iii),(iv),(a),(b), (C), Guidelines for Method Of Disposition, (1), Published Opinions. A published opinion will be filed when the decision, (i), changes an existing rule of law; (ii), continuing public interest (iii), criticize or questions existing law, (iv), contribution to legal literature, (A), (B), (C),(v)(vi), (2), (D) 1, 2, 3, (D)(2),

A course of action directed by The Seventh Circuit Court of Appeals unpublished Order that has classified, as confidential, and/or otherwise exempted disclosure of toxic chemical information for Public and Medical review, thus denying Appellant's right of jury petition and/or equal protection of laws under the XIV amendment § I, of the Constitution of the United States on the environmental impacts of the Appellants chemical injury, and of the Southern District Court's circumventing protection for the State of Indiana's omitted preconditioned statutory environmental duties to the Exclusive Remedy Provision of the Indiana Worker's Compensation Act, Occupational Disease Act

through Defendant's Self-Insured Medical Management Policies. Appellees are using the State of Indiana's exclusive remedy provision as an "overt act" for breaching of individual privilege to the legal process through unjustified Summary Judgments and Motions to Dismiss, thus the Lower Court's are a protecting factor in the Appellees unlawful violation's for statutory duties to warn of health and safety. In that the Courts, State and Federal Agencies are multiplied and/or not made aware of the rampant use of toxic chemicals in Plaintiffs work place. Appellees fraudulent misconduct is in the sophisticated inaccurate, outdated and/or withholding of chemical substances and mixtures in the manufacturing of Electrical Transformers. No Defendant's Corporate Administrator will divulge Proprietary Information, Patents, Composition of Chemicals, for their place's of work, avoiding direct responsive answers to questions by objection or equivocation, subverted with malice aforethought perpetrated by conduct in the furtherance of the Appellee Employer, affirming for Defendants "enterprise" a system of economic crime, controlled by an application of intimidation and financial restrictions.

Appellees biased physicians misdiagnosis and/or do not give precise work place data, Defendant's Physicians do not test (Appellant and/or any employee) for "known" chemicals in their work place, failing to acknowledge any valid abnormality to physical or mental health, do not timely process injury claims; tampering and/or multiplying physicians who give Plaintiffs, employee's positive second medical opinions, corrupting the validity of their reports, and procedures, a system of intimidation and delaying of compensation,

until physicians concur that the self-insured claims do not reflect any inappropriate chemical peculiarity, there-by complying with self-insured subsidiary companies, their Physicians, Attorneys, and under an Exclusive Remedy Provision for the States Worker's Compensation Act and Occupational Disease Act, Defendant's,
"Unrestricted" Independent Medical Examiner's.

This constitutes an ongoing self-insured system under a State's color of law, a superceding exclusive remedy provision that is inadequate and ingenuous to a working class of citizen's, individual health and safety, 18, U.S.C. § 1035. There-by the Lower Court's are consequently mitigating further adverse unconstitutional environmental injuries through Adjudicatory proceedings for "partial" Motions to Dismiss, Summary Judgment's and Unpublished Orders; this is a subtle erosion of life, liberty, and due process, including statutory and legal principles. Thus the Lower Court's interpretation of associated Appellees self-insured health care system and the State's selective exclusive remedy provision that makes the Court's interposed unpublished order and summary judgment's on Indiana Law biased, there-by rendering Plaintiff, Appellant no relief under common law and/or equal protection of safety law, Plaintiff therefore is asking leave of the Seventh Circuit Court to petition, The United State Supreme Court. The Court in making decisions of Federal and State Questions of Law on Appellants Case, Consider "all" Pleadings, Exhibits, Affidavits, Motions, Points and Authorities, all Appellants designated documentation properly given to The United States District Court Southern District of Indiana Indianapolis Division and The Seventh District

Court of Appeals, as Appellants declaratory decree of intentional injury tort was violated and/or the Lower Court's Adjudicatory proceedings were circumvented through the misrepresentation of a State's exclusive remedy clause and non application of Federal Questions of Law. Plaintiff Appellant alleges as to the following,

CONSTITUTIONAL SOVEREIGNTY

Constitutional standing requires a showing of three elements: (a) An "injury in fact" that is concrete and particularized; (b) A connection between the injury and the conduct at issue—the injury must be fairly traceable to the defendant's action; and (c) Likelihood that the injury would be redressed by a favorable decision of the Court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 1992).

It is the Plaintiff, Appellants contention that Appellant suffered a continued intentional injury, that is caused by the Defendants' continuing cover-up in the Lower Court's for "racketeering activities." Because of Appellees pattern of negligent misrepresentation and delaying Adjudicatory proceedings, "withholding" of Medical Reports that are vital to the health of the Appellant and other exposed Employees, because of poisonous irreparable pathological damage's, diminished health, functional capacity, or life expectancy caused by the Appellees "knowing," breached statutory duties and standards, Appellees injuring by an overt act in furtherance of a RICO (18 U.S.C. 1961 et seq.,) conspiracy, predicated acts of racketeering while in a Transformer Manufacturing enterprise, Appellees continued participation in interstate commerce of

"Congressionally Banned " Polychlorinated Biphenyl's. As the Defendant Appellees are still using prohibited and/or "generating" Polychlorinated Biphenyl's, (Diphenyl) dibenzo-furans ("PCDFs") and/or dioxins ("PCDDs"), toxic contaminants pyrolytic byproducts of (PCBs) with ionizing radiation (*Radionuclides*) in commerce.

See Appellants Petition's and Exhibits : of World Wide Web Internet EXHIBIT'S filed with The Southern District of Indiana, Indianapolis, Division. **Asea Brown Boveri T&D** states on its **World Wide Web Internet Page** that "ABB manufactures and repairs large Power Transformers with PCBs at the degree to less than 500 PPM " **For nearly 50 years**, ABB has built, repaired and refurbished power transformers to help move power cleanly and efficiently across the U. S. Working with ABB's partners, PCB contaminated units contain less than 500 PPM can be repaired and upgraded."

(A) This is an egregious public distributing (PCB) Product Advertisement, designed to attract public attention and patronage.

(B) After Plaintiff submitted Exhibit's of this fact in The Southern District of Indiana, Indianapolis, Divisions Adjudicatory proceeding and to the Appellee Defendant's Attorney's this Web Page was pulled from the World Wide Web Internet,

(C) "The Court's are again being informed and/or for the third time and the third Court, being made aware of the Defendants potentially dangerous activity. And there for should, " restrain " Defendants from using **(Toxic PCBs)**, Plaintiffs Facts, Pleadings and Evidence for

Defendants ongoing conspiracy and a cover-up for the Muncie, Indiana Toxic Transformer Facility.

(D)" Defendants and there Attorneys have used Plaintiff pleadings, internet activity and the Lower Court's Adjudicatory preceding in which to cover-up a criminal Investigation or prosecution of the Defendants sophisticated " ongoing " Fraudulent commercial transactions." Title 18 § 1343 (relating to wire fraud, including fax, e-mail and internet).

ARGUMENT FOR WRIT CERTIORARI

Defendant's unreasonable and dangerous use of toxic chemicals in the Appellant Plaintiffs common community, with intent to deceive by concealing, misrepresenting and gross misconduct to Appellant and using the same predicated acts and/or rendering identical conduct to the Lower Court's, by giving fraudulent facts of the poisonous concentration's of Polychlorinated Biphenyl's, in the local transformer plant, without regard to the health and safety of Appellant and fellow workers, to their injury and death 18 U.S.C. § 1035, (False statements relating to health care matters).

The Seventh Circuit Court of Appeals has taken the same position as the District Court for the Southern District of Indiana, Indianapolis Division by only recognizing Sections of an Indiana Act

Ind. Code § 22-3-2-6, through Ind. Code § 22-3-7-6 - Exclusive Remedy Provision, and does not consider the Act's preconditioned Statutory Duties. As The Seventh

Circuit Court of Appeals has affirmed the Southern District Courts interpretation and/or taken out of context opinion, and has not applied all qualifications and/or requirements for the Exclusive Remedy Provision of (WC Act & OD Act), to the demarcation of all State and Federal Health Codes, and Appellees Statutory Duties, there-by making a total perversion of the civilized purposes of the Act's, and/or permits an Employer Appellee the use of this provision guaranteeing safe-conduct in the Lower Court's for their industries against liability for an "intentional" chemical injury tort. The Seventh Circuit Court of Appeals Order did not address and/or omitted preconditioned Indiana Codes and/or Statutes in (WC Act & OD Act). Did not question as to the complete Act of Indiana Legislation.

"The Worker's Compensation Act
Indiana Code 22-3-2-7 No relief from penalty for failure to perform statutory duty. - ---"
"Nothing in IC 22-3-2 through Indiana Code 22-3-6 shall be construed to relive any employer or employee from penalty for failure or neglect to perform any statutory duty." [Acts 1929,ch. 172, § 7, p. 536; PL 144-1986, § 24.]

Indiana Code 22-3-2 cross-reference;
(OD Act) & (WC Act) of the Occupational Disease Act § 7, "Nothing in this chapter shall be construed to relieve any employer or employee from penalty for failure or neglect to perform any statutory duty. (Formerly: Acts 1937, ch. 69 §.4d; Acts 1963, c388, §.7.) As amended PL 144-1986, § 59

Appellant questions the legality of the interpretation's of the Exclusive Remedy Provision of (WC Act & OD Act) "one Provision of an Indiana Act" by The United States District Court Southern District of Indiana Indianapolis Division, and The Seventh District Court of Appeals for Appellees violating health and safety statutory duties, thus circumventing Health Codes of State and Federal Law, for Defendant Appellees pattern of unlawful conduct by their usage of uncontrolled toxic poisonous Organochlorines in Appellant and fellow employees work place, Appellees misconduct is in a continued illegal activity in the use of (PCBs) in commerce, under Interest for all Public Health & Safety. The Seventh Circuit Court of Appeals and Southern District Courts interpretation and/or taken out of context opinion, has not applied Indiana Code's and/or "omitted" entirely, Appellee Defendant's State and Federal Statutory Duties and Standards on Health issues in a work environment.

Case No. IP 91 -626 C - B/S, Baker v. Westinghouse Electric Corporation, Monsanto Co., *SUPREME COURT OF INDIANA* No. 49 S00-9309 - CQ -1004

> The Workers Compensation Act does not protect Employers for intentional torts. " intentionally " or "knowingly " harmed Employees."

Plaintiff Appellant at no time granted Monsanto, Westinghouse/ABB, or gave his informed consent to exposure and/or subject him to physically injurious toxic poisonous **Organochlorines**, (ingredients in pesticides, insecticide, fungicide and rodenticide), **Dichlorodiphenyltrichloroethane (DDT), (Lindane,**

gamma isomer C6 H6 CL6) and **1,2,3,4,5,6-Hexachlorocyclohexane, Chlordane, Phenol** a poison or carbolic acid. Plaintiff Appellant calls in-to question the interpretations and the Constitutionality of Exclusive Remedy Provision of (WC Act & OD Act) "one section of an Indiana Act" and/or The Lower Court's interpretation of one provision of an Act that allowed Indiana's deliberate indifference to all civil and criminal Federal Safety and Health Codes, Statutes and Standards to the poisoning of Appellant and fellow employees, thus making the Lower Court's a contributing factor in Appellee, Defendant's unregulated, unlawful conduct in commerce of an "ongoing" PCB Conspiracy and of a concealing in the Lower Court's the lethal activities of Defendant's Muncie Indiana Toxic Substance Facility.

Case NO. IP 91-626-C-B/S Baker vs. Monsanto in The United States District Court Southern District of Indiana, Entry granting Defendants Motion for Summary Judgment and denying plaintiff's' Motion for partial summary judgment, Monsanto in Statements of Facts went so far as to say to the Indiana Court's, **"Although Monsanto did not sell any of its PCB fluids to Westinghouse for use in its Muncie plant."**

Comes now Case No. IP 97-2034-C H/G John F. Fultz vs. Monsanto, Westinghouse/ABB in Defendant Monsanto Company's Answer, First defense – Admissions and Denials page-2 paragraph 8. " **Monsanto admits it sold products to Westinghouse and ABB for use at the Muncie Transformer plant."**

Petitioner, is contending a continuing Danger exist in the Lower Courts Summary Judgments and Motions to Dismiss for Prohibited acts,

See; Rules of Professional Conduct 1.2 (d).
prima facie evidence; **Defendants & Plaintiff's Attorneys,** and/or so called **Officers of the Court** are anomalous endorsers, are jointly and severally liable in the capacity in which they signed and/or certified unlawful "egregious" endorsements in the Indiana, Baker Case's and the Missouri, Brown Case, for Muncie Indiana. Attorneys endorsed false Affidavit's and declarations made under oath before the Lower District Court's, partial summary judgment's, Corporate Mangers, Administrator's giving "Sham Affidavit's" declarations made under oath before the Lower Court's, because they know they would not have to face their accuser's, Exposed, Injured and Dying Plaintiff's.

A vexatious or false defense subtly drawn by Defendants Attorneys in that they have created a mendacious untruth to the Lower Court's and they're for allowed this discriminatory and unlawful act of chemical injury and Death to continue. Defendants' Administrator's, using Corporate Attorney's as Environmental Regulators have continuously impeded and hindered the due course of justice, with intent to deny the Petitioner and this low-income community equal protection of the law for an ongoing PCB Conspiracy and the cover-up of a Muncie Indiana Toxic Transformer Facility."

See Exhibit's; of (First Amended Complaint) page 6, ¶ 18, 19, 20. **"Contaminated vapotherm solvent is**

processed though a cycle evaporating as much solvent as possible." "Contaminated oil shall be transferred from the on-line system to "Fuel Oil Tank" to be used as fuel during cold weather"
(40 CFR 761.202 through 761.205). Generator.
EPA Storage/Generator's NO. Muncie, IND. 006062582.

See Exhibits; " Monsanto Chemical Co. Reported receiving the following shipments of PCB fluids from Westinghouse Muncie Transformer Plant for disposal, 15,085 pounds in 1973, 30,847 pounds in 1974, 8,710 pounds in 1975"
See Exhibits; CECOS Env. Inc. Independent Contractor, Cincinnati Ohio for Muncie, Indiana Evaluation Study, Analytical Samples, Cost Evaluation and Confidential Agreement Manifest No. 9321-002 - 9321-055, No. 9121-002 - 9121-050

To Verify Manifest No.# See: Exhibits; U.S. EPA Region V. Exhibits; for Trial Rule 60 (B), Motion on Documents from and /or to [Chicago Illinois] EPA Region Five, through the "Freedom of Information Act" PCB Inventory and **Disposal Record of 1984 - 1987, 1989 - 1990,** Exhibits; Westinghouse Electric Corporation, Power Transformer Division, Contracted with CECOS Environmental, Inc., Ohio District. "**Muncie Site (PCBs) containing 50 ppm (or more) 1,438.35 tons of PCB Contaminated Soils and 18,347 Gallons of contaminated rainwater."** at CESCOS' New York, Waste Water Treatment Facility."

See Exhibits; Statute Penalties, and Citations for the State of Indiana Department of Labor Industrial Hygiene Compliance **9/5/91 - 12/7/91** Scrub Water Violations hazardous chemicals at the workplace ABB Power T&D,

Inc. Muncie, Ind. Employee's of Corporate Cleaning Systems Inc. **"are exposed to waste water which contains 2.6 ppm of Arochlor PCB 1254."**

The State of Indiana Department of Labor, (IOSHA), (ISBH), Indiana State Board of Health, Federal Department's of Labor under; Contract Work Hours and Safety Standards Act , Title I, Sec. 107, 1962
Never cited or gave sanctions to the violations of Westinghouse / ABB Power T & D for unlawful conduct, (EPA Region V), (NIOSH), never informed a Plaintiff Appellant and/or fellow Employee's they were working with poisonous concentrations of unlawful toxic PCBs. Never issued Penalties, and/or Citations for unlawful (PCDDs) (PCDFs) contaminants of pyrolytic byproducts with elevated concentration's of ionizing radiation for a Plaintiff and/or any Employee at the Muncie Transformer Plant.

See Exhibits: All Muncie Star Public News Paper Article's on Muncie Indiana Local Transformer Plant and the discarding of (PCB) Equipment, Sold and Liquid Material's. In a Muncie Star New Paper Article 2, 6, 1989 A Muncie physician employed by Westinghouse Electric Corp. Transformer Factory in Muncie "says he knew nothing about alleged PCB exposure of workers at the plant until recently."

" My partner and I have been going out their 3 days a week for about 15 years." Osborne said. "I haven't seen anybody who came in during that time and even said he thought he had that [PCB exposure]" He added: " I don't know anything about PCBs, other than it's like every

time you open a bottle of diet soft drink it says it can cause cancer."
Diana L. Web v. T.D., D.C., R.K.S., MD., and C.H.A., MD., Case No. 97 - 2555, Supreme Court of Montana, 951 P.2d 1008;1997 Mont. LEXIS 285; 54 Mont. St. Rep.1502, **Physician "Duty" of Reasonable Care.**

See; John F. Fultz Social Security Cause, Complaint (SSA) entered 1/14/97 Grants 2/04/99 IP 97 - 1838 B/S Southern District Court, Indiana Division

See ; Letter to Plaintiff Appellant dated November 29, 1996. Dr. Michael Johnson, Internal Medicine, Indiana University Medical Center, stated that, **"Collectively, these findings are very suggestive of significant impairments caused by chemical exposure"**

See; Letter, 12/5/97 Mayo Medical Laboratory in Rochester, Minnesota. Coproporphyrins, at 174 ug/24 hours, Acceptable reference range less than or equal to 96 ug/24 hours in men. Formula "estimating" unsafe levels, and/ or a risk assessment.

See: Ongoing medical reports, diagnosis and disabilities for Plaintiff Appellant, related to Radiation Oncology, Psychiatrist, Psychologist,

U. S. COURT of APPEALS have repeatedly upheld the decisions, which concurred that the concept of a Threshold Exposure Level has no practical significance where carcinogens are concerned.
(EDF v EPA 510 F. 2d1292, DC CIR. 1975)

Case CV-S-89-555-LDG-LRL United States District Court District Of Nevada, Nevada Power Company vs.

Monsanto, General Electric and Westinghouse, "Westinghouse **"Smoking Gun"** Malicious destruction of evidence to prevent its disclosure in toxic tort litigation."

1987 Westinghouse Electric Corporation v. 22 Insurance Company's Superior Court Of New Jersey Law Division: Union County, **Contaminants in the Muncie, Indiana Facility**

Florida Power & Light Co., vs. Westinghouse Electric Corporation **"(PCBs) in Mineral Oil of Transformers."**

Florida Power & Light Co., v. Allis Chalmers Corp.,Central Molony, Inc., General Electric., Kuhlman Electric Co., McGraw Edison, Inc., Case No. 94 - 4834, 11 Circuit Court of Appeals. "Westinghouse Sold to Florida Power & Light oil filed transformers contaminated with hazardous substance known as **Polychlorinated Biphenyl's, Lead, Arsenic, and Antimony "**

See Exhibits; Monsanto Safety Data Sheet's and Registered Trademark's. WESTINGHOUSE ® INSULDUR) For the Court's, **® Insuldur is solid PCB,** [Phenolic Resins, Diphenylamine Paraffin] Insuldur Treated Paper.

See Exhibit : Westinghouse Safe Practice Data Sheet, Revised 1971 At the Muncie plant, which commenced operations in **1961**, Westinghouse manufactured electrical power transformers using (highly chlorinated dielectric) wax, paint, solvents and inerteen oils until transformer plant closing **1998**. "Prior to 1,1, 1965

Transformer Interteen was a mixture of **60 percent Hexachlorodiphenyl and 40 percent Trichlorobenzene.** From 1, 1, 1965 to 1, 1, 1968 Transformer Inerteen consisted of a mixture of **70 percent Pentachlorodiphenyl and 30 percent Trichlorobenzene** On 1, 1, 1968, Transformer Inerteen was changed it now consists of **Trichlordiphenyl to which 0.2 percent Glycidyl Phenyl Ether is added as a scavenger."**

See: Letter of W. T. Duboc,"1976"General Manger Large Power Transformer Division. **"The transformer oil that we use in our plant is a high grade mineral oil that has no additives "**

Official Policy and/or Answer's for all Defendants' Managers/Administrator's for Westinghouse, ABB, Corporation's and Monsanto Company.

Mens Rea Scienter, (egregious statements entered to the Lower Court's in the Missouri Brown and Indiana Baker Cases)

(1.) " The Muncie plant manufactured only large power mineral oil Transformers."

(2.) "No transformers of a type using a dielectric fluid containing PCBs were ever manufacture at the Muncie plant."

(3.) "Monsanto did not sell any of its PCB fluids to Westinghouse for use in its 'Muncie plant."

Plaintiff Appellant severed on 3/ 27/ 98, delivering to the Defendant Appellees three Law Office's, two boxes of one hundred and twenty - five pounds or more discarded documents, listed chemicals, numbering and uses in manufacturing, Records on Chlorinated Dielectric Compounds, Phenolic Resins, Paint,Varnish, Aroclor

Solvents, Inerteen Oils, Diphenylamine Paraffin Wax and/or Insuldur Treated Paper, with First Amended Complaint. Defendant Appellees Attorneys accepted this Material without Controversy.

Plaintiff could not ask for Discovery, with prior knowledge of Westinghouse **"Smoking Gun"** Malicious destruction of evidence to prevent disclosure in toxic tort litigation."

See; all Exhibits, Pleading and Plaintiffs Court ignored, First and Second Request for additional evidence and/or application to adduce Third Party Production of Documents, Under Trial Rule 26 (b) Trial Rule 34, (a) (b) (c) (d) with Reference to, Trial Rule 9. 2 (e)

At all material times, tort-feasor Defendants Monsanto, Westinghouse, ABB T & D being knowledgeable and sophisticated users of PCBs, Inventors and Registered Patent Holders, of these man-made (ingredient's for insecticides) Poisons, conspired to intentionally, willfully and knowing with deliberate participation in using high concentrations of PCBs in unremitting transaction's for local transformer commerce, with "Prior knowledge " of illegal activity under Plaintiffs working conditions using PCBs. Maliciously concealing the poisonous effects from the Plaintiff and fellow workers, the Court's, State and Federal Agencies.

See: Exhibit; An " Ongoing" Disproportionately High List of Deaths from the Muncie Indiana Transformer Plant. **The Worker Death List** From the Transformer Plant's Westinghouse Retirees News, Westinghouse

/ABB Sympathy Club Receipt, Local 917 IUE Union Records and Local News Paper, Obituaries.

Incorporated Westinghouse/ABB and Monsanto had "Prior Knowledge" and "with held" toxicological (Scientific Testing and Methodology for the Causation of latent chemical injurious poisoning) data from all Appellants Physicians, all Medical Health Care Providers, the Indiana and Missouri Court's. Appellee, Defendant's volunteered distorted fraudulent analytical statements and/or representations to the Lower Courts, State and Federal Agencies, and did not "warn", ***"Culpa lata"*** (because of Patent and/or Proprietary Information) a working class of citizens, so-called Laymen on the dangers of Poisonous concentrations and health effects of Polychlorinated Biphenyl's, a betrayal and/or a pattern of known misconduct to Appellant and fellow workers health, denying " Civil Liberty's," and/or a "total disregard" for a healthful standard of life, denying "Human Rights" to a working class of individuals. The Defendant Appellee Manufacturer's, Chemical Supplier motivated by profit, intentionally placed in the stream of commerce unreasonably dangerous under Plaintiffs Appellants working conditions Polychlorinated Biphenyl's "knowing" and concealing that, heat defectively creates pyrolytic byproducts (PCDFs), (PCDDs) magnifying strength and danger (*Ionizing Radiation's*), there-by causing physical harm to Appellant and/or any Employee, in the manufacturing and repair of Electrical Transformers. "Knowing" and concealing for over 40 years their harmful consequences and health effects of these man-made Pesticide Organochlorines, concealing from Institutions, Organizations & Laboratories such as (EPA), (NIOSH), (IOSHA), Indiana

State Department of Labor, and (ISBH), State Board of Health, for Muncie Indiana. Appellee, Defendants Using "fraudulent" Industrial Health and Safety Standers, and/or Appellee, Defendants' continuing conduct in withholding Medical Information is **"Apartheid "** Under Appellees, Self-Insured Medical Policy's and the State of Indiana's biased interposed, circumventing (Deprivation of rights under color of law 18, U.S.C. § 242) Exclusive Remedy Clause of WC Act & OD Act. Appellees fraudulent, deliberate and wanton indifference in portraying to Occupational Safety & Health Agencies the health effects of Polychlorinated Biphenyls.

In 1975, Monsanto solicited Industrial Bio-Test Laboratories to falsely portray a PCB animal study. IBT agreed to falsify its report, and Monsanto knowingly submitted the deliberately falsified report to the U.S. government. When the government subsequently discovered the fraud, Monsanto attempted to defend what had transpired, and thereby further ratified IBT's fraudulent preparation of the false report.

In 1979, Monsanto fabricated three human health studies of its Nitro, West Virginia workers in order to avoid being found liable to soldiers injured in the Vietnam War by TCDD contaminating the military defoliant Agent Orange manufactured by Monsanto.

Monsanto, Informed the U.S. Environmental Protection Agency

> "That PCBs pose a less **"acute"** toxic health hazard than many substances not proposed on the EPA's list,"

Despite Monsanto's prior knowledge of the toxicity of PCBs, to forestall governmental regulations and to convince government agencies-s and the public that PCBs were not dangerous there-by giving an intentional effort in keeping facts from the EPA, and/or delaying a criminal investigation of the Appellee Defendants ongoing commercial transactions, Monsanto Westinghouse/ABB, had " Prior knowledge" of the Toxic effects of Poisoning PCBs (ingredient in pesticides) their extraordinary persistence in the environment, and their propensity to bioaccumulate in the tissues of living organisms to their injury and death.

Violating Health Codes and/or Statutory Duties of "a complete Act of Written Legislation. There-by violating legislation for the State of Indiana, Acts of Congress, misrepresentation and breach of fiduciary duty of numerous Federal, State Health and Safety Statutes, By violating implied contractual and/or promissory estoppel claims of, Employee Collective Bargaining Agreement's, "Employees Retirement Policy's," Disability Health & Safety Benefits Plan's, Life Insurance through "Employers Self-Insured Medical Management Policy's" Appellee Employers unethically distorting and/or destroying chemical work reports, medical records, medical data in Employer's Human Resources at local Self-Insured Medical Departments, records that are vital to Plaintiff Appellants health. Original documents, original chemical records of Employer Asea Brown Boveri, T&D Inc, Former Employer, Westinghouse (CBS) along with Monsanto Company's chemical manufacturing records. Monsanto made fraudulent statements and/ or distorted representations to State and Federal Agencies and the Lower Court's, thus

causing all Courts, State and Federal Agencies to withhold from Appellant and/or all Employees, the toxic effects of Polychlorinated Biphenyl's.

ENVIRONMENTAL JUSTICE

> "The Fourteenth Amendment Due Process Clause and Equal Protection Clause are among the most defiled of all rights in the State Court's, State Trial Courts often by intimidation and financial restriction, deny access to the Courts as identified by the United States Fifth Circuit Court of Appeals in Ryland v. Shapiro 21.

American Society has observed the formation of a new scheme to administer a perverted system to deal with personal injury related cases. It has been devised within the vacuum of the State and Federal Court's, this vacuum has formed within the over-burdened Courts, whom, over the past twenty years have virtually removed themselves as the protectors of environmental hazards in low-income communities and individual health rights, there-by denying civil liberties to this socioeconomic group or working class. Defendant's uncontrolled system takes great profits from injustices, which an adversarial system can provide when its malfeasance, impropriety, and/or dishonest management overcoming by artful maneuvering of State and Federal Court's, with deliberate selective application of statutes, ordinance and regulations, modifying conditions of judicial injunctive relief, and/or the total "omission" of State and Federal health law's. The architects of this scheme are those who

profit greatest from the circumventing of State and Federal health laws with disregard of Appellee Defendants cruelty, torment and destruction of lives. They are Federal and State politically appointed directors' and/or environmental decision makers, Lawyers, huge bureaucratic establishments that receive power and funding through the destruction of this community via the depravation of inherent, inalienable and constitutionally guaranteed rights. It is more than a system of petty tyrants, it is an industry dedicated to profiteering at the expense of this social order.

A network of institutions and legislation itself adjudges "without Appellee's truthful data, and/or honest information on Chlorinated Dielectric Compounds' Congress incompetent to fashion a rational legislative design for Polychlorinated Biphenyl's. It also adjudges Government Agencies and the Courts incompetent to regulation and/or form a practice for the Safe use of Polychlorinated Biphenyl's in the manufacturing and repair of Electrical Transformers without Defendants disclosure of appropriate information. Defendants have established in a vestigial sally to accomplish no more than to devour the very health of this American working class. The network does this without regard to the damage inflicted upon children, parents, families, (direct and extended) society in general, and their individual rights under law. It lends itself to be perverted by those who have created an industry out of it. Defendants industry that puts selfish interests before Law or Morality, Defendants industry improperly operates and determines the lives of the very low-income working class based on a deficiency of facts, archaic laws and biases, with disregard for any rules of

evidence or presumptions of innocence, that has resulted in Defendants proceedings in which diagnoses are made, certainty of humble speculative opinion is expressed, from Plaintiff and this community's point of view, Defendant's actions are taken on the basis of unsupported "junk science" and/or beliefs using sophisticated techniques and methodology riddled with error and falsehood.

The declaration of these great wrongs are not limited to the solitary claim of this Plaintiff, It is a plea to the State and Federal Court's, Guardians of the Great Writ, to defend the Constitution, that is voiced by hundreds of injured and dying workers in Muncie Indiana, Even the President of the United States of America, who has voiced, and issued Executive Orders from the White House, indicating recognition of some of the concerns contained herein.

On February 11, 1994, President Clinton issued Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." National Environmental Policy Act (NEPA), In April of 1995, the U.S. Environmental Protection Agency (EPA) released the document titled; "Environmental Justice Strategy: Executive Order 12898." The 1969 as amended. 42 U.S.C. 4321-4347.January 1, 1970. EIS (40 CFR §1508.14). U.S.C. 15 § 2601

The Plaintiff alleges that the tort-feasor Defendants have continuously impeded and hindered the due course of justice, with intent to deny the Plaintiff and this low-income community equal protection of Environmental law and discriminated by so doing. This consists of Self-Insured Appellees their Health Care

Professionals, Politically Appointed Decision Makers in Environmental Agency's Defendants Attorneys, Politically Connected Judicial Appointees from the Highest Court in our Nation down through the Lower Court's of America, Appellee Defendants Institutions that participated in not identifying the requisites of known injuries and death for PCBs, and/or participated in misconduct that was a direct cause to this disproportionate number of injury and death, in this socioeconomic group of workers and the adverse chemical injuries of this Plaintiff Appellant. Structures to this enterprise has existed in Delaware County, in the State of Indiana at the Muncie Transformer Plant from **1961** and continued in manufacturing of Electrical Transformers until **1998.**

In the Brown and Baker Cases 1990 - 1998
[Plaintiff Appellant's Attorney's]
Did-not issue to the Lower Courts, Testimony, Affidavits, Interrogatories, from a Corporate Manager/Administrator, nor Etiology of adverse health effects for an Appellant Plaintiff, to an Indiana or Missouri Court's Adjudicatory proceedings. Voluntarily introducing fraudulent statements to the Court's on PCBs. Monsanto, Westinghouse, and the betraying of Plaintiff Appellant's Attorney's allegations, evaluations and presentations to the Lower Courts in, Brown v. Monsanto Company Cause No. 862-00694 Div. 1, 803 S.W. 2d 610 , (Mo. App.1990, Baker Westinghouse,637 N.E. 2d 1271 (IN.1994, *Baker v. Monsanto Co.*, 962 F. Supp. 1143 (S.D.Ind. *1997)("Baker), aff*"d sub nom. *Taylor v. Monsanto Co., 150* F.3d 806 (7th Cir. 1998) ,

Prevarications of Attorneys and Judges etched dubious benchmarks into the annals of Indiana jurisprudence.

Appellee's used fraudulent Statements, Sham Affidavits and Exhibits along with one provision of an Indiana Act, interposed in bad faith with malice for Defendants Motion's to Dismiss and Summary Judgment's. The Southern District Court interceded with the erroneous interpretation and Judgment's based on the **Indiana Baker Trilogies,** using these fraudulent exhibits, pleadings, and affidavits to continue an untruth in Summary Judgment's and Motion's to Dismiss.

In that the Southern District Court gave an interposed accusation, contending Appellees statutory duties of only **"negligence, recklessness, or appreciable risk of harm"** under (WC & OD Act's), Exclusive Remedy Provision. And a declaratory decree of the Southern District Court of Indiana was,

" Plaintiff could not use the Southern District Courts Forum and/or proceeding to commence a criminal prosecution or investigation of the Defendant's."

REASONS FOR GRANTING WRIT OF CERTIORARI

Appellant, petitions for chemical injury and *prays* to bring to light for this socioeconomic group of Electrical Worker's who are enduring such a disproportionate share of negative environmental consequences, to their injury and death, resulting from Appellee Defendants programs and policies in the industrial operations of manufacturing and repair of Electrical Transformer's in

Muncie Indiana. The Petitioner and this socioeconomic group have genuine claims of Prior Knowledge affecting the calculation of accrual fraud, deceit, and concealment of vital information crucial elements for Appellants injury claim, namely, that these are continuous torts—"a pattern" of both continuous and unlawful conduct of a (RICO) PCB conspiracy. Petitioner's legal action is predicated upon continuous and unlawful State activity of being Politically Correct for Appellees Industries, and/or non-confrontational as to the States Unfocused Regulation of Toxic and Hazardous Pollutants. The State of Indiana's Department of Labor and Health Agencies will not confront, enforce, nor implement State and Federal Health Codes, the States administration and process are of a deliberate indifference to State legislative Act's and Federal guidelines for Occupational Health and Safety Policies for Appellant and fellow workers in Appellees Muncie Indiana Electrical Transformer Plant.
Plaintiff Appellant asks The United State Supreme Court, to hold these Incorporated Defendant Appellees accountable for misapplication of Federal, State Health & Safety Law. Under Civil, Criminal RICO Standards and under the False Claims Act for **Egregious Behavior of Multiple Fraudulent Acts, Conspirators for Battery, Fraudulent Concealment, Continuing Fraudulent Act's, Tortuous Failure to Warn, Restitution, and Strict Product Liability.**

Past conduct that by its nature projects into the future with a threat of repetition.
Northwestern Bell, 492 U.S. at 240-41.

Standard; the measure of fraud is its departure from moral uprightness, Fundamental honesty, fair play and candid dealings in the general life of members of society. United States v. Kreimer, 609 F.2d 126, 128 (9th Cir. 1980).

Wherefore Petitioner, John F. Fultz, Pro Se, *"prays"* for relief in this *Writ Of Certiorari* under; 28 U.S.C. 1253, (Any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges). The Seventh Circuit Court of Appeals Unpublished Order affirmed the Southern District Court of Indiana, Indianapolis Division final judgment granting the Respondent's Appellee Chemical Suppliers Summary Judgment, Appellee Employer's Motion to Dismiss, on Appellants chemical injury claim. Petitioner, requests to The United States Supreme Court, for relief from the Seventh Circuit Courts unpublished Order, Under 28 U.S.C. § 2101 direct appeal from any decision for 28 U.S.C. 1253 using Congressional Guidelines 29 U.S.C. 651 (a) (b) 1 - 13, As the Lower Court's were unavailable in answering all Congressional and State questions of health and safety law. And the Seventh Circuit Courts Order was unpublished and based on Indiana's circumventing exclusive remedy clause of (WC Act & OD Act) and "A " Sophisticated Bulk Purchaser Defense, and/or gave no relief on unlawful Federal questions of Appellants declaratory decree of intentional tort. Relief from the Southern District Court was circumvented in the Adjudicatory proceedings on the Courts interceding and applying of Sham Affidavits and Exhibits for the

Baker Trilogies " and the Exclusive Remedy Provision of (WC Act & OD Act). The Plaintiff alleges that the tort-feasor Appellees' have continuously impeded and hindered the due course of justice, with intent to deny the Petitioner and this low-income community equal protection of work place environmental law, and of the Lower Court's betrayal of a person's fundamental right of jury trial petition and/or a violating of due process under, U.S.C. 42 § 8431 for a **Claim of Unconstitutionality** for the **Constitution of the United States** and the **Constitution of the State of Indiana.**

Pro Se, John F. Fultz
679 North CR. 1000 W.
Farmland, Indiana. 47340
Phone (765) 468 - 8665

APPENDIX A.

INDIANA PRECEDENTS
THE INTENTIONAL TORT EXCEPTION OF WORKER'S COMPENSATION EXCLUSIVITY

B. GENERAL CONSIDERATION

Workers' compensation laws address broad public policies pertaining to work-related injuries. These laws compromise the employee's right to a common law tort suit for job-related injuries in return for relatively certain and standardized compensation. Larson, The Nature and Orgins of Workmen's Compensation, 37 Cornell L.P. 206,229. Generally, worker's compensation laws afford the employee's exclusive remedy against his employer for a job-related injury. This has been termed part of the qud pro quo whereby the employer assumes liability without fault in return for a limited compensation liability. Larson, The Law of Workmen's Compensation, Sec. 65.11, pp. 12-1 to 12-6 (1983); Prosser, Handbook of the Law of Torts, Sec. 80, pp. 531-532 94th ed., 1971). The system does not, nor was it ever intended to, supplant the common law tort system. Larson, The Nature and Origins of Workmen's Compensation, 37 Cirbekk K.P. 206 (1952). See also, Mandolidis v. Elkins Indus., 246 S.E. 2d 97,913 (W.Va. 1978) ("The workmen's compensation system completely supplanted the common law tort system only with respect to negligently caused industrial accidents.")

Workers' Compensation remedies focus upon the relationship of the event to the employment, specifically, whether the injury arises out of and occurs in the course of employment. See, 1 A Larson, The Law of Workmen's Compensation, Sec. 6.10 abd 14.00. Thus, the scheme is meant to provide compensation for "accidents" which are thought to be naturally associated with the employer's business operation. Serious employer misconduct falls outside statutory exclusivity of workers compensation, because to shield the employer from common law liability under such circumstances would be antagonistic to the public policy underpinnings of workers'' compensation laws. Thus, courts consistently recognize the right of an injured worker to pursue his common law remedy for an intentional tort, as outside the exclusive coverage.

See, 2 A A. Larson, The Law of Workmen's Compensation, Sec. 68.13 n.10.1. An intentional tort may be maintained outside the workers' compensation remedy where the employer knows that the harm in question is substantially certain to occur as a result of his misconduct.

2 AA.Larson,The Law of Workmen's Compensation, Sec. 68.13.

INDIANA PRECEDENTS...,

THE Indiana Worker's Compensation Act (the "Act") contained the following exclusivity's provision:

Rights and Remedies of Employees Exclusive. The rights and remedies granted to an employee subject to

I.C. 22-3-2 through I.C. 22-3-6 on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death, except for remedies available under I. C. 6-7-3.6 .

I.C. 22-3-2-6. Likewise, the Occupational Diseases Act ("ODA") contains an exclusivity provision, which reads:

Rights and Remedies under Chapter Exclusive. The rights and remedies granted under this chapter to an employee subject to occupational disease arising out of and the course of the employment shall exclude all other rights and remedies of such employee, his personal representative, dependents or next of kin, at common law or otherwise, on account of such disablement or death. I.C. 22-3-7-6.

In Evans v. Yankeetown Dock Corp., 491 N.E. 2d 969 (IND. 1986), this court defined the parameters of the Indiana Worker's Compensation Act. That case arose out of the fatal shooting of an employee by one of his co-employees. The court acknowledged that the statute's against his employer, only to the extent that the employee is "subject to this act on account of personal injury or death by accident.' 491 N.E. 2d 962; I.C. 22-3-2-6. Furthermore, the court recognized that the employee is free to pursue his common law rights and remedies where the injury does not occur by accident. Id. The jurisdictional line of demarcation was described as follows:

We hold that I.C. 22-3-2-6 excludes all rights and remedies of an employee against his employer for personal injury or death if the following statutory jurisdictional prerequisites are met:

A. Personal injury or death by accident;
B. Personal injury or death arising out of employment;
C. Personal injury or death arising in the course of employment. 491 N.E. 973.

Additionally, the Evans decision clarified the meaning of the "by accident" requirement. The court held that the statutory language should be applied literally. Thus, injury or death by accident" was held to mean " **unexpected injury or death"** 491.N.E. 2d 974-975.

Since Evans, the Indiana courts have consistently recognized that an intentional tort claim of an employee against his employer fails outside the jurisdictional scope of the Indiana workers' compensation laws. National Can Corp. v. Jovanovich, 503 N.E. 2d 1224, 1232 (IND. APP. 1987) House v. D.P.D. Inc., 519 N.E. 2d 1274,1275 (IND. APP. 1988); Shelby v. Truck & Buss Group Division of General Motors Corp., 533 N.E. 2d 1296, 1298, 1299 (IND. APP. 1989); Cox v. American Aggregates Corp., 580 N.E. 2d 679,684 (IND. APP. 1991); Perry v. Stitzer Buick, GMC, Inc., 604 N.E. 2d 613,617 (IND. APP. 1992); Wolfe Corporation v. Thompson, 609 N.E. 2d 1170, 1173 (IND. APP. 1993) Gordon v. Chrysler Motor Corp., 585 N.E. 2d 1362, 1365 (IND. APP. 1992). See also, Tacket v. General Motors Corp. Delco Remy Division, 181 F. Supp. 1243, 1249 (S.D. IND. 1993).

Even prior to Evans, Indiana courts acknowledged the right of an injured employee to sue his employer for an intentional tort where such a claim is supported by the facts. See e.g., Tribbett v. Tay Mor Industries, Inc., 471 N.E. 2d 332, 333 (IND. APP. 1984).

The employee's cause of action for intentional tort was perhaps most cogently explained in National Can Corp. v. Jovanovich, 503 N.E. 2d 1224, 1232 (IND. APP. 1987): [b]oth the plain language of the compensation statute and the opinion in Yankeetown recognized that if an employer intentionally injures an employee, the Act does not apply. Public policy reinforces this conclusion since it would be a total perversion of the humanitarian purposes of the Act to permit an employer to use the Act as a shelter against liability for an intentional tort. Thus, the trial court had jurisdiction to entertain Jovanovich's claim alleging an intentional tort.

In sum, the intentional tort exception to the exclusivity of worker's compensation laws has been universally accepted by the Indiana State courts. Admittedly, in some cases, the courts have found plaintiff's factual allegations or proof to be insufficient to support the intentional tort claim. However, in others, the plaintiffs' claims were sufficient to survive pre-trial disposition. See e.g. Perry 604 N.E. 2d 613.

In the case of violent crimes both the Act and the ODA are not exclusive remedies
I.C. 5-2-6.1-1 and its predecessors, I.C. 16-7-3.6 and I.C. 12-18-6.

Courts have held that a plaintiff may recover in strict products liability or negligence when a manufacturer

fails to provide adequate warnings regarding the use of its product,

(see, Voss v Black & Decker Manufacturing Co., 59 NY2d 102, 106-107; 9;

Wolfgruber v Upjohn Co., 72 AD2d 59, 62, affd 52 NY2d 768).

A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known

(see, Cover v Cohen, 61 NY2d 261, 275; 7;

Donigi v American Cyanamid Co., 57 AD2d 760, affd 43 NY2d 935;

Weinberger, 1 New York Products Liability § 18.04;

see also, Grzesiak v General Elec. Co., 68 NY2d 937).

APPENDIX B

State Laws

For Writ Of Certiorari

Indiana Code 22-3-9-1 For reckless, or willful violation of the duty to provide a safe place to work.

Indiana Code 13-11-2-155 Sec. 155. (a) "PCB", for purposes of: (1) **IC 13-17-10;** (2) **IC 13-20-15;** and (3) **IC 13-22;** Means the class of organic compounds known as polychlorinated biphenyl's or terphenyls. (b) The term includes any of several compounds produced by replacing at least two (2) Hydrogen atoms on the biphenyl or terphenyl molecule with chlorine. As added by P.L.1-1996, SEC.1

See;
Indiana Code 13-11-2-105 Sec. 105. "Incidental concentrations of PCB", for purposes of IC 13-20-15-3, means Concentrations of PCB that are beyond the control of the person and that are not the result of the person:

(1) Exposing the: (A) Item; (B) Product; or
(C) Material;To concentrations of PCB;
(2) Failing to take reasonable measures to rid the:
(A) Item; (B) Product; or (C) material;
Of concentrations of PCB; or
(3) Failing to use a reasonable substitute for the:
(A) Item; (B) Product; or (C) material;
For which the exemption is sought.
As added by P.L.1-1996, SEC.1.

Indiana Code 22-1-1-10 Sec. 10. Every employer and place of employment under the Jurisdiction of the department of labor created by this chapter shall:

(1) Furnish employment that is safe for the employees therein;

(2) Furnish and use safety devices, safeguards, methods, and Processes reasonably adequate to render employment and place of Employment safe; and

(3) do every other thing reasonably necessary to protect the safety of the employee. Enacted 1945 Amended 1985

APPENDIX page : 3-4 IC 22-3-9-11 Sec 11 This chapter shall be construed as supplemental to all statutes in force on March 2, 1911, concerning employers and employees and shall repeal only such statutes as are in direct conflict with provisions of this chapter. Nothing in this chapter shall be held to limit the duty or liability of employers or to impair the rights of their employees under common law or any other statute existing March 2, 1911, or to affect the prosecution of any proceeding or right of action pending on March 2, 1911. (Formerly: Acts 1911,c.88, s.11.) As amended by P.L. 144-1986, SEC. 84.

Indiana Code 34-20-1-1 This article governs all actions that are: (1) brought by a user or consumer; (2) against a manufacturer (3) regardless of the substantive legal theory or theories.

Indiana Code 34-20-2-1

(1) that "user" or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition;

FORENSIC DOCUMENT EXAMINER for the Court's Verifying of any and all Document's in the possession of Plaintiff.
The court can use **Indiana Code 34-3-15-2** and/or the Court's can also use

Rule 706 of the Federal Rules of Evidence.

Indiana Code 34-3-15-2 Enacted 1949 Amended 1995
Indiana Code 34-3-15-2 Sec. 2. Any such photographic, Photostatic, miniature photographic, or optical image copy or reproduction shall be deemed to be an original record for all purposes and shall be treated as an original record in all courts or administrative agencies for the purpose of its admissibility in evidence. A facsimile, exemplification, or certified copy of any such photographic or optical image copy or reproduction shall, for all purposes, be deemed a facsimile, an exemplification, or a certified copy of the original record. (Formerly: Acts 1949, c.168, s.2.) As amended by P.L.79-1995, SEC.3.

Indiana Code 34-7-7-9 Sec. 9. (a) (3) Specify time limits for the discovery of evidence to respond to material issues raised in the motion. **(b)** The person who files a motion to dismiss must state with specificity the public issue or issue of public interest that prompted the act in furtherance of the

person's right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana.

(c) The court shall make its determination based on the facts contained in the pleadings and affidavits filed and discovered under the expedited proceeding.

(d) The motion to dismiss shall be granted if the court finds that the person filing the motion has proven, by a preponderance of the evidence, that the act upon which the claim is based is a lawful act in furtherance of the person's right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana. As added by P.L.114-1998, SEC.7.

Indiana Code 34-5-2-2 Sec. 2. Other courts of the state shall have the power to establish rules for their own government, supplementary to and not
conflicting with the rules prescribed by the Supreme Court, or any Statute. (Formerly: Acts 1937, c.91, s.2.) Enacted 1937 Amended 1937 1. "Indiana Occupational Safety and Health Act"

Indiana Code 27-1-7-23 Sec. 23. A director, officer, agent, or employee of any company who knowingly subscribes, makes, or concurs in making or publishing any annual or other statement required by law, containing any material statement which is false, commits a Class A misdemeanor. (Formerly: Acts 1935, c.162, s.100.) As amended by Acts 1978, P.L.2, SEC.2708.

Indiana Code 22-3 Chapter 9. Sec. 1-11 " Employer Liability "

IC 22-3-9-11 Sec 11 This chapter shall be construed as supplemental to all statutes in force on March 2, 1911, concerning employers and employees and shall repeal only such statutes as are in direct conflict with provisions of this chapter. Nothing in this chapter shall be held to limit the duty or liability of employers or to impair the rights of their employees under common law or any other statute existing March 2, 1911, or to affect the prosecution of any proceeding or right of action pending on March 2, 1911. (Formerly: Acts 1911,c.88, s.11.) As amended by P.L. 144-1986, SEC. 84.7

Questions of, negligence or contributory negligence shall be questions of fact for a jury to decide.
IC 22-3-9-11 IC 22-8-1.1-37.1

Indiana Code 22-8-1.1-49 Knowingly Violates, Class (B) Misdemeanor

Indiana Code 22-8-1.1-17.2,(c) Employers safe and healthful conditions of work,

Indiana Code Section. 22-8-1.1-20.1 Variance from a Standard, Variance from standard, employees given notice by posting

Indiana Code Section. 22-81.1-39.1(a), Imminent Danger Exists in any workplace in this State,
Indiana Code Title 22, Article 8, Chapter 1.1 Sec.15
Formerly Acts 1971, PL 356, Sec.1. Standards for the protection of the life, health or safety of employees.

Indiana Code 22-8-1.1-17.1 (a) Use of labels or forms warning, to insure employees are apprised of all hazards to which they are exposed, relevant symptoms and emergency treatment.
Categories; of Products See, : 16 CFR 1500.130

PCB Label 40CFR 761.45 15 U.S.C. 1261 (p) (1);
16 CFR 1500.3 (b) (14) 8 Sec. 128. "Material safety data sheet", for purposes of IC 13-25-2, means the data sheet Developed under 29 CFR 1910.1200(g). As added by P.L.1-1996, SEC.1.

Indiana Code 13-11-2-7 Sec. 7. "Alternative PCB technology", for purposes of
IC 13-17-10, means a technology for the treatment and disposal of PCB that presents:

(1) An actual; or a potential; Alternative to incineration. As added by P.L.1-1996, SEC.1.

Indiana Code 13-11-2-159 Sec. 159. "Pesticide", for purposes of IC 13-25-6, includes a substance or a combination of substances commercially produced for use as:

(1) an insecticide; (2) A rodenticide; or

(2) A nematodicide.As added by P.L.1-1996, SEC.1.

Indiana Code 13-11-2-233 Sec. 233. "Toxic material", for purposes of IC 13-27, means any of the following:

(1) A chemical substance in a gaseous, liquid, or solid state that meets the definition of hazardous

substance in the Comprehensive Environmental Response, Compensation, and Liability Act, as in effect on January 1, 1990 (42 U.S.C. 9601(14)). A mixture of substances described in subdivision)

(1) An element, a substance, a compound, or a mixture designated by the commissioner as a toxic or hazardous substance.

(2) A mixture of substances containing a substance described in subdivision (1). As added by P.L.1-1996, SEC.1.

Indiana Code 13-11-2-42 Sec. 42. "Contaminant", for purposes of environmental Management laws, means any solid, semi-solid, liquid, or gaseous matter, or any odor, radioactive material, pollutant (as defined in the federal Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), as in effect on January 1, 1989), hazardous waste (as defined by the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), as in effect on January 1, 1989), any constituent of a hazardous waste, or any combination of the items described in this section, from whatever source, that:

(1) Is Injurious to Human Health, plant or animal life, or property;

(2) Interferes unreasonably with the enjoyment of life or property; or

(3) Otherwise violates: (A) Environmental Management Laws; or (B) Rules adopted under Environmental Management Laws.

As added by P.L.1-1996, SEC.1. IC 13-11-2-94 Sec.94. "Hazardous Chemical", for purposes of IC 13-25-2, has the meaning set forth in 42 U.S.C. 11021(e).

As added by P.L.1-1996, SEC.1.6. (a) "Hazardous Material", for purposes of IC 13-18-5, means any of the following:

(1) A hazardous chemical (as defined in 42 U.S.C. 11021(e), as in effect on January 1, 1990).

(2) A hazardous waste.

(3) A hazardous substance (as defined in 42 U.S.C. 9601(14), as in effect on January 1, 1990).

(4) A substance that is on the list of extremely hazardous Substances published by the Administrator of the United States Environmental Protection Agency under 42 U.S.C. 11002(a)(2).

(5) A material that is identified by the water pollution control board as potentially harmful to surface water or groundwater if accidentally released from a storage or handling facility. (b) "Hazardous material", for purposes of IC 13-25-6, means a material or waste that has been determined to be hazardous or potentially hazardous to human health, to property, or to the environment by:

(1) The United States:

(A) Environmental Protection Agency;

(B) Nuclear Regulatory Commission;

(C) Department of Transportation; or

(D) Occupational Safety and Health Administration; or

(2) The solid waste management board.

The term includes all of the hazardous materials identified in 49 CFR 172.101. As added by P.L.1-1996, SEC.1.

Indiana Code 13-11-2-98 Sec. 98."Hazardous Substance", for purposes of IC 13-25-4 and IC 13-25-5, has the

meaning set forth in Section 101 of (CERCLA 42 U.S.C. 9601). The term includes any substance that the solid waste management board determines to be hazardous under environmental management laws.
As added by P.L.1-1996,

I C 22-81.1-39.1 SEC.1. Imminent danger

Indiana Code 34-20-4 Chapter 4. Defective Products
Indiana Code 34-20-4-1

Sec. 1. A product is in a defective condition under this article if, at the time it is conveyed by the seller to another party, it is in a condition:

(1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and

(2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.
As added by P.L.1-1998, SEC.15. 2

Indiana Code 34-20-4-2 Sec. 2. A product is defective under this article if the seller fails to:

(1) properly package or label the product to give reasonable warnings of danger about the product; or

(2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer. As added by P.L.1-1998, SEC.15. 1

Indiana Code 34-20-1-1 Sec. 1. This article governs all actions that are: (1) brought by a user or consumer; (2) against a manufacturer or seller; and
(3) for physical harm caused by a product; regardless of the substantive legal theory or theories upon which the action is brought. As added by P.L.1-1998, SEC.15.

Indiana Code 34-20-2 Chapter 2. Product Liability Actions

Indiana Code 34-20-2-1 Sec. 1. Except as provided in section 3 of this chapter, a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property is subject to liability for physical harm caused by that product to the user or consumer or to the user's or consumer's property if:

(1) that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition;
(2) the seller is engaged in the business of selling the product; and
(3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article. As added by P.L.1-1998, SEC.15. 2

Indiana Code 34-20-2-2 Sec. 2. The rule stated in section 1 of this chapter applies although:

(1) the seller has exercised all reasonable care in the manufacture and preparation of the product; and (2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

However, in an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions. As added by P.L.1-1998, SEC.15. 3

Indiana Code 34-20-2-3 Sec. 3. A product liability action based on the doctrine of strict liability in tort may not be commenced or maintained against a seller of a product that is alleged to contain or possess a defective condition unreasonably dangerous to the user or consumer unless the seller is a manufacturer of the product or of the part of the product alleged to be defective. As added by P.L.1-1998, SEC.15.

Indiana Code 34-20-2-4 Sec. 4. If a court is unable to hold jurisdiction over a particular manufacturer of a product or part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom a court may hold jurisdiction shall be considered, for the purposes of this chapter, the manufacturer of the product.

As added by P.L.1-1998, SEC.15.

Indiana Code 34-7-7-8 Sec. 8. If a court finds that a motion to dismiss made under this chapter is:

(1) frivolous; or

(2) solely intended to cause unnecessary delay; the plaintiff is entitled to recover reasonable attorney's fees and costs to answer the motion.

As added by P.L.114-1998, SEC.7.

APPENDIX C

Federal Laws

For Writ Of Certiorari

Complaint verified under , 28 U.S.C. sec. 1746,

U.S. COURT of APPEALS have repeatedly upheld the decisions, which concurred that the concept of a Threshold Exposure Level has no practical significance where carcinogens are concerned.
(EDF v EPA 510 F. 2d1292, DC CIR. 1975)

U.S. Department of Health and Human services have determined that PCBs may reasonably be anticipated to be Carcinogens. Carcinogen as defined in 29 CFR 1910.1200(d)(4).
1 Public Law 94-469 - Oct. 11, 1976
90 STAT. 2025 (e) POLYCHLORINATED BIPHENYLS (A), (B), (2) (A), (B) The published title, "PCB Ban" Source; Federal Register, Vol. 44, No. 106 Part VI (May31, 1979), pp. 31514-31568; March 10, 1981, pp. 16090-16098.
Required Labeling Under T S C A Federal Register pages 31543 and 31556
Federal Register (Vol. 44, No. 106 p. 31517) Lists THREE CLASSES of Transformers Federal Register Section, XII, pp. 31537-31538

Manifest control, requiring that the generator of hazardous waste maintain records and be responsible for all such wastes from the point of generation, through the

transportation process to the point of final disposal. RCRA is a "**cradle-to-grave**" final disposal is the only certain time when a Generator / manufacture of hazardous waste no longer has any liability concerning the status of PCB items.

The final decision will ultimately be decided in the courts (Federal Register, May 31, 1979, p. 31539).

EPA (CERCLA) Case Reg. No. 68855-24-3 (Generic: Askarel) (PCB Mix)

Federal RICO claims. 18 U.S.C. § 1965(a). Venue provisions that allow the action to be brought where the defendant resides, are found, has an agent, or transacts business.

This action is being brought where the RICO claim arose.

18, U.S.C § 1965 (d) Venue 4 (c). Civil remedies.

Expert Panel under **Rule 706 of the Federal Rules of Evidence.**2.

Fed. R. Civ. P. 26 (a) (2), 26 (e) (1). (Relevant Expert's Testimony).

Joe S. Cecil and Thomas E. Willging, Scientific and Technological Evidence:

Accepting Dauberts Invitation: Defining a Role for Court-Appointed Experts In

Assessing Scientific Validity, Emory L.J. 995, 1002 (1994) (citing Ex Parte

Peterson, 253 U.S. 300 (1920); see also Reilly v. United States, 863 F.2d 149, 154 & n.4 (1st Cir. 1988) (hereinafter "Cecil & Willging I at ").

For a detailed analysis of the courts role as "gatekeeper" in admitting expert testimony,

See; Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

(40 CFR 761.202 through 761.205). Generator

(40 CFR 761.207 through 761.210). Manifest

(40 CFR 761.3) (U.S.C. 42 §§ 7412, 13, 14), Hazardous air pollutants.

Comprehensive Environmental Response, Compensation, and Liability Act, as in effect on January 1, 1990 (42 U.S.C. 9601(14).

Federal Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), as in effect on January 1, 1989), hazardous waste (as defined by the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), as in effect on January 1, 1989),
A hazardous chemical (as defined in 42 U.S.C. 11021(e), as in effect on January 1, 1990
A hazardous substance (as defined in 42 U.S.C. 9601(14), as in effect on January 1, 1990).

A substance that is on the list of extremely hazardous Substances published by the Administrator of the United States Environmental Protection Agency under 42 U.S.C. 11002(a)(2).
Hazardous Materials identified in 49 CFR 172.101.As added by **P.L.1-1996, SEC.1**.

"Hazardous Substance", Section 101 of CERCLA (42 U.S.C. 9601).
"Material safety data sheet", Developed under 29 CFR 1910.1200(g).

PCB Label 40CFR 761.45, 15 U.S.C. 1261 (p) (1); 16 CFR 1500.3 (b) (14)

Categories; of Products See, : 16 CFR 1500.130 18, USC Sec. 241(Conspiracy against Rights).

18, USC § 1035 (False statements relating to health care matters).

18, USC § 242 ...(Deprivation of rights under color of law).

USC 42 § 1981 (a) (b) (c) Equal rights under the law

18 USC § 297 False, fictitious or fraudulent claims

18, USC Sec. 1001 (1993) § 1001.

Statements or entries generally,

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or

fraudulent statement or entry, shall be fined not more than 10,000 or imprisoned not more than five years, or both.

18 USC Sec. 287 (1993)

§ 287 . False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

1 et seq., **(TSCA)** Federal legislation, control of toxic substance, chemical mixtures do not present an unreasonable risk of injury to health or the environment.
False Claim Organized Crime Control Act of 1970, Act of October 15,
1970, PL 91-452, codified at 18 U.S.C. §§1961-1968.
False Claims Act ("FCA" or "Act"), 1131 U.S.C. §§ 3729-33 (1988 & Supp. V 1993).
Environmental Covenants. Id. at *39.

18 USC § 19612 (Marking Requirements for Bulk Packaging).

49 CFR, 172.313 (Poisonous Hazardous Materials).

US Code Title 15 Chapter 30 –(Hazardous Substance).

29, U.S.C. § 666 – (a) (b) (c) (d) (e) (g) (i) (j) (k) (l)

(Civil and Criminal Penalties).Codified at3,.

> U.S.C. 42 § 8431 (a) (b) (c). Civil action for deprivation of rights Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

RCRA § 1004

In 1976, Congress enacted the Toxic Substances Control Act, 15 U.S.C. 2601, et seq., which prohibited the manufacture, processing, or distribution in commerce of PCBs after January 1, 1978, other than in a totally enclosed manner, unless (EPA) found that such processing and distribution did not present an unreasonable risk of injury to health or the environment. USC 29 § 651, USC § 301 (6).

Imminent Hazards USC § 2606

Authority for the Court under USC Title 42 §§ 1983, 1985, 1986, 1988, and 4. Criminal acts under Federal Laws, a

criminal act give rise in support of this action out of the same operative facts under
USC Title 18 §§ 241, 242, 1512, 1963,

18 USC § 3 Accessory after the fact
18 USC § 241 Conspiracy Against Rights of Citizens

18 USC § 242 Deprivation of Rights Color of Law

18 USC § 512 Tampering with a Witness, **Victim**, or informant
18 U.S.C.A. §§ 1961-1968, Racketeer Influenced and Corrupt Organizations Act it is a criminal offense, punishable by fine or imprisonment of not greater than twenty years for any acts or threat involving extortion which is chargeable under State law and punishable by imprisonment for more than one year or any act under certain provisions of the United States Code including but not limited to **Title 18 § 1341** (relating to mail fraud), **Title 18 § 1343** (relating to wire fraud), (or "any private or commercial interstate carrier" such as Fedex or UPS) or phone (including fax, e-mail and internet)

Title 18 § 1503 (relating to obstruction of justice);
Title 18 § 1510 (relating to obstruction of criminal investigations),
Title 18 § 1511 (relating to the obstruction of State or local law enforcement),
Title 18 § 1513 (relating to retaliating against a witness, victim, or an informant),
Title 18 § 1951 (relating to interference with commerce);

THE OCCUPATIONNAL SAFTY AND HEALTH ACT OF 1970, Imposes on every Employer in the private sector an unprecedented **"General Duty "** to "Furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his or her employees."

Defendants " as defined in 18 USC § 1961 by virtue of being an individual, partnership, corporation, association or other legal entity. All of the defendants are participants in an "association-in-fact" enterprise. USC 42 § 6924, USC 42 § 6921 (e).
USC 42 § 11043 (c) 11021 - 11022 - 11023

Reasonable Accommodation as allowed under the law, Americans with Disabilities Act, Titles I, II & III of the ADA. 42 USC 12101, 42 USC 12102 (Auxiliary Aids and Services), 28 CFR 35.149-35.150. Standard, (program accessibility,") and the Rehabilitation Act.

Comprehensive Environmental Response,
Compensation, and Liability Act,
as in effect on January 1, 1990 (42 U.S.C. 9601(14)).
(1) A mixture of substances described in subdivision.
(2) An element, a substance, a compound, or a mixture designated by the commissioner as a toxic or hazardous substance.
(3) A mixture of substances containing a substance described in subdivision (1). As added by P.L.1-1996, SEC.1.

Federal hazardous waste (as defined by the Federal Water Pollution Control Act (33 U.S.C.

1251 et seq.), as in effect on January 1, 1989), any constituent of a hazardous waste, or any combination of the items described in this section, from whatever source, that:

(1) Is Injurious to Human Health, plant or animal life, or property;

(2) Interferes unreasonably with the enjoyment of life or property; or

(3) Otherwise violates: (A) Environmental Management Laws; or (B) Rules adopted under Environmental Management Laws. As added by P.L.1-1996, SEC.1.

Hazardous Materials identified in 49 CFR 172.101. As added by P.L.1-1996, SEC.1.

"Hazardous Substance", has the meaning set forth in Section 101 of CERCLA (42 U.S.C. 9601). The term includes any substance that the solid waste management board determines to be hazardous under environmental management laws. As added by P.L.1-1996, SEC.1.

4) Human Environment

40 CFR 1508.15) Jurisdiction by Law

29 CFR 1910.1200(d)(4). Carcinogen as defined in

42 U.S.C. Sec. 11021) 1. Material Safety Data Sheets Reporting 1. Provision of Information to Health professionals

29 USC Chapter 6 Sec. 114 " Labor"

DOT regulation **49 CFR Parts 171-173,** May 22, 1980 for required PCB shipping instructions).

The United State Supreme Court,
Is moved to take judicial notice of the following Federal Law:

THE SUPREME LAW OF THE LAND

The equal protection clause is not intended to provide "equality" among individuals or classes but only the "equal application" of the laws. Therefore, the result of a law is relevant so long as there is no discrimination in its application. By denying state's the ability to discriminate, the equal protection clause of the Constitution is crucial to the protection of civil liberties and human rights.

Public Law 91-596 91 St. Congress, S. 2193 Dec. 29, 1970 As Amended by Public Law 101-552, Sec. 3101, Nov. 5, 1990 As Amended by Public Law 105-198, July 16, 1998 Sec. 5. Duties, (1)"Each Employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; Shall comply with Occupational Safety and Health Standards promulgated under this Act."

On February 11, 1994, President Clinton issued Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." National Environmental Policy Act (NEPA) should provide opportunities for federal Agencies

to address environmental hazards in minority communities and low-income communities. In April of 1995, the U.S. Environmental Protection Agency (EPA) released the document titled;
"Environmental Justice Strategy: Executive Order 12898."
The 1969 as amended. 42 U.S.C. 4321-4347.January 1, 1970. EIS (40 CFR §1508.14). U.S.C. 15 § 2601
28 U.S.C. APPENDIX - RULES OF CIVIL PROCEDURE
Rule 17,
Rule 17. Parties Plaintiff and Defendant : Capacity
STATUTE ¶ (a) Real Party in Interest. ¶ b)- Capacity to Sue or Be Sued. (b)-The capacity of a Corporation to sue or be sued shall be determined by the law under which it was organized See. (b) (1) - (2) - Title 28, U.S.C. Sec. 754 and 959 (a). Under the Corporation's Articles of Incorporation and By-Laws as reported to and/or under Securities Exchange Act of 1934.

(RCRA) is a "**cradle-to-grave**" final disposal is the only certain time when a Generator / manufacture of hazardous waste no longer has any liability concerning the status of PCB items. **The final decision will ultimately be decided in the courts**
(Federal Register, May 31, 1979, p. 31539).

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
(Submitted November 15,1999**)
Decided March 8, 2000

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

JOHN F. FULTZ,
Plaintiff-Appellant,

Appeal from the United States District Court for the Southern District of Indiana. Indianapolis Division No. 99-2433

v.

ABB POWER T& D., INC .,et al.

No.IP97-2034-C-B/S

Defendants-Appellees.

Sarah Evans Barker, *Chief Judge.*

** After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a).

ORDER

John Fultz appeals pro se the district court's grant of summary judgment in favor of the defendants in his toxic tort suit. His complaint alleged that the physical and mental maladies from which he suffers resulted from his exposure to toxic chemicals, primarily polychlorinated biphenyls ("PCBs") produced by Monsanto Company ("Monsanto"), during the time he was employed by the defendant CBS Corporation, formerly known as Westinghouse Electric Corporation ("Westinghouse"), ABB Power T & D Company ("ABB Power") and ABB Asea Brown Boveri, Ltd. ("ABB Asea"). We affirm.

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From 1966 to 1994, Fultz worked at a Muncie, Indiana, plant that manufactured and repaired large electrical power transformers. The plant was originally owned and operated by Westinghouse. In 1989 and 1990, Westinghouse and ABB Power jointly owned the plant. From 1990 onward, ABB Power was the sole owner of the plant. ABB Asea is a stock holding company, and the record suggests it might also be ABB Power's parent company.

Until 1973, Westinghouse used Monsanto-produced fluids containing PCBs as insulating compounds for the heat transfer system at the plant. After 1973, Westinghouse replaced the PCB fluids with a toxic fluid produced by Monsanto that did not contain PCBs. Beginning in 1990 "or earlier," Fultz began experiencing a series of health problems including muscle weakness

and fatigue. In November 1996, one of his physicians observed that his ailments probably resulted from his exposure to chemicals.

In December 1997, Fultz, proceeding pro se, filed a personal injury suit against ABB Power, Monsanto, and Westinghouse in Indiana's Delaware Superior Court. The defendants removed the complaint to federal court, asserting diversity jurisdiction.[1] Several months after removal, Fultz amended his complaint, alleging that the defendants defrauded him and "intentionally and systematically poisoned" him with PCBs, thereby "directly and proximately" causing him injury. In addition, he alleged that the defendants conspired to harm him by concealing from him the dangers of his work situation in order to promote their mutual purpose to increase profits.

CBS and ABB Power jointly moved to dismiss the complaint. *See* Fed. R. Civ. P. 12(b)(6). They argued that Fultz's complaint failed to state a claim upon which relief could be granted because no state law cause of action existed for his claims - the claims were covered by the exclusive remedy provisions of Indiana's Worker's Compensation Act, Ind. Code § 22-3-2-6, and the

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[1] Throughout his filings, Fultz has steadfastly maintained that his is not a worker's compensation case. Thus, the removal of his case was proper despite the statutory prohibition that civil actions brought in state court under state worker's compensation laws cannot be removed to federal district court. *See* 28 U.S.C. ~ 1445(c).

Occupational Diseases Act, Ind. Code § 22-3-7-6. Because Fultz filed materials beyond his pleadings along with his response to defendants' motion, the district court alerted the parties that it would review the motion under a summary iudgment standard. ABB Asea moved separately to dismiss the complaint. Joining CBS and ABB Power in their motion to dismiss, it added that Fultz had neither served it with process nor sought leave from the court to add it as a defendant. *See* Fed. R. Civ. P. 12(b)(4).
No.99-24 33

The district court held that Fultz's claims fell within the exclusive remedy provisions in the Worker's Compensation Act and the Occupational Diseases Act, and accordingly granted summary judgment in favor of CBS and ABB Power. The court then granted judgment in favor of ABB Asea. The court noted that ABB Asea was not Fultz's employer, and therefore could not be liable for the toxic exposure he alleged. Next, the court granted summary judgment for Monsanto, explaining that since the evidence showed that Westinghouse was a "sophisticated intermediary," Monsanto acted reasonably in relying on Westinghouse to warn its employees about the dangers of PCBs and the other chemical products it bought from Monsanto.

On appeal, Fultz first argues that the district court improperly granted surnmary judgment for the defendants because the court overlooked genuine issues of disputed material fact, notably those implicated by his

verified filings with the court. Yet, beyond noting generally that the defendants communicated different warnings to Westinghouse workers than they did to the researchers and buyers of their products, Fultz does not elaborate the specific material facts he believes to be in dispute. Fultz's failure to specify his disputed facts dooms his challenge to the district court's decision. *See Foreman v. Richmond Police Dept,* 104 F.3d 950, 957 (7th Cir. 1997) (genuine issue of material fact not demonstrated by mere existence of some alleged factual dispute between the parties or by demonstration of some metaphysical doubt as to the material facts).

Next, Fultz contends that the district court incorrectly decided that his claims fell within the exclusive remedy provisions of both the Worker's Compensation Act and the Occupational Diseases Act. For Fultz to avoid the reach of the Worker's Compensation Act, he must show that his injuries did not arise "by accident" in the course of his employment. Ind. Code 22-3-2-6. *See Tacket v. General Motors Corp.,* 93 F. 3 d 3 3 2, 3 3 4-3 5 (7th Cir. 1996); *Perry v. Stitzer Buick GMC, Inc.,* 63 7 N.E. 2d 1282, 1286 (Ind. 1994). Beyond his conclusory allegations, however, the record contains no evidence that any of his employers deliberately intended to injure him. *See Baker v. Westinghouse Elec. Corp.,* 637 N.E. 2d 1271, 1275 (Ind. 1994); *Foshee v. Shoney's, Inc.,* 637 N.E. 2d 1277,1281 (Ind. 199 ' 4). Moreover, Fultz's claims regarding Westinghouse and ABB Power state that he suffered injury from exposure to chemicals that occurred while he was employed at the Muncie plant. His complaint addressed no injuries other than those covered by the reach of the Occupational Diseases Act -those "arising out

of and in the course of his employment at the transformer plant. Ind.Code 22-3-7-6. *See Baker*, 637 N. E. 2d at 1276-77. The district court thus properly found his claims were within the Worker's Compensation Act and the Occupational Diseases Act.

Next, Fultz argues that the district court erroneously determined that ABB Asea was not subject to his suit. Because the injuries Fultz alleged fall under the provisions of the Worker's Compensation Act and the Occupational Diseases Act, ABB Asea cannot be

subject to liability under any theory of respondent superior. *See McQuade v. Draw Tite*,). Moreover, Fultz failed either to assert or present evidence that ABB Asea was either a parent company of his employer ABB Power, or that, as a parent company, it committed torts against him separate from those of ABB Power. *See* id. at 1020 (in certain circumstances employee's tort suit against employer's parent company exempted from Worker's Compensation Act's exclusivity provision). Therefore, the district court properly declined Fultz's request to amend his complaint by adding ABB Asea as a defendant on grounds that such an amendment would be "an act of futility." *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 773 (7th Cir. 1995) ("futility of amendment" appropriate reason to deny motion to amend).

Next, Fultz argues that the district court wrongly granted summary judgment to Monsanto because the undisputed

facts showed that Monsanto knowingly sold Westinghouse highly dangerous chemicals, that Monsanto did not warn Fultz of the dangers of its products, and that Fultz suffered injury from his exposure to the chemicals Westinghouse received from Monsanto. Fultz's argument

is unconvincing. Indiana courts recognize the "sophisticated intermediary" defense, which relieves a product manufacturer of the duty to warn an ultimate user of its product when that product is sold to a "knowledgeable or sophisticated intermediary" whom the manufacturer has adequately warned. *See Natural Gas Odorizing, Inc. v. Downs,* 685 N.E. 2d 15 5, 163 n. 10 (Ind. Ct. App. 1997); *Taylor v. Monsanto Co.,* 150 F.3d 806, 808-809 (7th Cir. 1998). Monsanto asserted this defense when it moved for summary judgment. Fultz acknowledges that Westinghouse was a "sophisticated intermediary." Throughout his amended complaint, he repeatedly alleges not only that all of the defendants were "knowledgeable and sophisticated users of PCBs," but also that Westinghouse purchased PCBs and other chemical products from Monsanto. Accordingly, the district court properly granted summary Judgment to Monsanto.

Finally, Fultz argues that the district court erred when it denied him both an interpreter and additional time for discovery, even when he presented the court with evidence that he was disabled because of mental and physical impairments that caused him to need more time to think, to speak, and to perform tasks. We will not disturb the court's exercise of its discretion unless the

denial of the requested discovery resulted in "actual and substantial prejudice" to Fultz. *See Weeks v. Samsung Heavy Indus. Co., Ltd,* 126 F.3d 926, 943 (7th Cir. 1997). Fultz fails to establish that he was substantially prejudiced-, in his brief on appeal he merely states that the court's denial of his requests prevented him from" overcoming summary judgment." Such a conclusory assertion is insufficient; neither his brief on appeal nor his motions to the district court identify what information he would have sought if given more time. Consequently, the court did not abuse its discretion in denying the motions. 'In addition, we note that during the 16 months while Fultz's case was before the district court, he was granted at least three

30-day extensions of time when he requested them. Moreover, when Fultz requested an interpreter, the court denied the request as moot because several of his friends volunteered to act as interpreters.

On the basis of the foregoing, the judgment of the district court is **AFFIRMED.**

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 8, 2000

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

JOHN F. FULTZ,
Plainiff-Appellant,

No. 99-2433

v.

ABB POWER T&D CO., INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. IP 97-2034-C-B/S

Sarah Evans Barker, *Chief Judge.*

ORDER

On consideration of the petition for rehearing en banc filed on March 21, 2000 by counsel for the plaintiff-appellant, no judge in regular active service has

requested a vote thereon all judges on the original panel have voted to **DENY** the petition. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing en banc be, and the same is hereby **DENIED.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN FULTZ,
Plaintiff

vs. P 97-2034-C-B/S

ABB POWER LTD. COMPANY, et al.,
Defendants.

ENTRY DISCUSSING SELECTED MATTERS

The court, having reviewed the above action, now makes the following rulings:

1 . The plaintiff has included in his opposition to certain defendants' motion for summary judgment a copy of the amended complaint, filed in this action on March 27, 1998. The resubmission of such material is unnecessary. That submission, therefore, is stricken from the materials submitted by the plaintiff as part of his "brief in opposition to defendant's motion for summary judgment," filed on August 3, 1998, and that. duplicative document shall be removed from such brief and returned to the plaintiff with his copy of this Entry.

2. Defendants CBS Corporation and ABB Power T & D Company, Inc. are requested to submit in an electronic format (WordPerfect or Ascii) their memorandum and reply in support of their motion to dismiss the defendants' amended complaint. If the plaintiff's brief in

opposition to the motion to dismiss (not including exhibits) is available in electronic format, the plaintiff is also requested to submit that document in an electronic format. Disks submitted for this purpose will be returned,

3. Because the plaintiff has opposed the motion to dismiss filed by defendants CBS Corporation and ABB Power T & D Company, Inc. with materials outside the pleadings, the parties are notified that such motion to dismiss will, to the extent warranted, be considered as a motion for summary judgment pursuant to FED.R.Civ.P. 12(b). Under this converted motion, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Id. *See Carter v. Stanton*, 405 U.S. 669, 671, 92 S. Ct. 1232, 1234 (1972); *Fleischfresser v. Directors of Sch. Dist.* 200, 15 F.3d 680, 684 & n.8 (7th Cir. 1994) (noting that reversal may be necessary if district court did not provide adversely affected party with notice and opportunity to respond).

4. Each party shall have through December 8, 1998, in which to supplement the pending motion to dismiss and opposition to such motion based on the notification issued in paragraph 3 of this Entry.

5. Although the moving defendants' argument that the court lacks subject matter jurisdiction over the plaintiffs claims against certain defendants would not require treatment of the motion to dismiss as a motion for summary judgment, see Crawford v. United States, 796 F.2d 924, 928 (7th Cir. 1986) ("The omission ... of a provision for converting a Rule 12(b)(1) motion into a

summary judgment motion . . . was not an oversight."), the foregoing notice is issued in an abundance of caution. **IT IS SO ORDERED.**

-Signature of Sarah Evans Barker -
SARAH EVANS BARKER, Chief Judge
United States District Court

Date: November 3, 1998

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN FULTZ,
Plaintiff,

Vs

IP 97-2034-C-B/S

MONSANTO CORPORATION,
Defendant.

ENTRY DISCUSSING PENDING MOTIONS

AND DIRECTING ENTRY OF FINAL JUDGMENT

In this action, plaintiff John Fultz ("Fultz") alleges that defendant Monsanto Corporation ("Monsanto") is liable for personal injuries suffered by Fultz as a result of exposure to polychlorinated biphenyls ("PCBs"). Monsanto seeks resolution of all of the claims asserted against it through the entry of summary judgment. Fultz has opposed the motion. For the reasons explained in this Entry, Monsanto's motion for summary judgment must be granted, Fultz' motion to strike must be denied, and Monsanto's motion to strike is granted in part and denied in part.

In summary, the decision in *Baker v. Monsanto Co.*, 962 F. Supp. 1143 (S.D.Ind. 1997)("*Baker*), aff"d sub nom. *Taylor v. Monsanto Co., 150* F.3d 806 (7th Cir. 1998), in which Westinghouse employees brought an action against Monsanto seeking to recover for injuries suffered from exposure to PCBs, is fatal to Fultz' claim in this case.

I. Summary Judgment

A. Summary Judgment Standard

Rule 56(c) of the *Federal Rules of Civil Procedure* provides that a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, an admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A "material fact" is one that "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine only if a reasonable jury could find for the non-moving party. *Id.*

A party moving for summary judgment initially has the burden of showing the absence of any genuine issue of material fact in evidence of record. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Schroeder v. Barth, Inc.*, 969 F.2d 421, 423 (7th Cir. 1992). "After one party has filed a motion for summary judgment, 'the burden shifts to the non-moving party to show through specific evidence that a triable issue of fact remains on issues [on] which the nonmovant bears the burden of proof at trial."' *Pharma Bio, Inc. v. TNT Holland* Motor *Express, Inc.*, 102 F.3d 914, 916 (7th Cir. 1996)(quoting Walker v. *Shansky, 28* F.3d 666,670-71 (7th Cir. 1994)). A nonmoving party cannot rest on its pleadings, but must demonstrate that there is

admissible evidence that will support its position. Tolle v. *Carroll Touch, Inc.*, 23 F.3d 174, 178 (7th Cir. 1994). To avoid summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586(1986).

B. Fultz as Pro Se Litigant

Because Monsanto seeks the entry of summary judgment and Fultz is proceeding without counsel, the notice required by Lewis v. *Faulkner*, 689 F.2d 100 (7th Cir. 1982) and Local Rule 56.1, was provided to Fultz by Monsanto. Through this notice, Fultz was notified of the nature of Monsanto's motion, the proper manner in which to respond and the consequences of failing to respond. This process afforded Fultz "a full opportunity to present contradicting affidavits or materials in order to cure a jurisdictional or party defect not capable of being resolved on the words of the complaint." *English v. Cowell, 10* F. 3d 434, 437 (7th Cir. 1993) (citing *Fountain v. Filson*, 336 U.S. 681 (1949)). Fultz has responded to Monsanto's motion with evidentiary materials and a discussion of his claims.

C. Motions to Strike

Evidence submitted in conjunction with a motion for summary judgment-either in support of such a motion or in opposition to it-must meet the standard prescribed in Rule 56(e) of the *Federal Rules of Civil Procedure*. On a summary judgment motion, when a party seeks to offer

evidence through exhibits, they must be identified by affidavit or otherwise be admissible. *Martz v. Union Labor Life Insurance Co.*, 757 F.2d 135, 138 (7th Cir. 1985). "Supporting materials designed to establish issues of fact in a summary judgment proceeding 'must be established through one of the vehicles designed to ensure reliability and veracity--depositions, answers to interroqatories, admissions and affidavits. When a partly seeks to offer evidence through other exhibits, they must be identified by affidavit or otherwise made admissible in evidence.'" *Friedel v. City of Madison*, 832 F.2d 965, 970 (7th Cir. 1987) (quoting *Martz*, 757 F.2d at 139).

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A similar requirement extends to other documents which are submitted in connection with a motion for summary judgment. A court deciding a summary judgment motion should not rely on unauthenticated documents filed in support of or in opposition to a motion for summary judgment. *Vukadinovich v. Board of School Trustees*, 776 F.Supp. 1325, 1326 (N.D.Ind. 1991), *affd*, 978 F.2d 403 (7th Cir. 1992), *cert. denied*, 510 U.S. 844 (1993). "To be admissible, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e), and the affiant must be a person through whom the exhibits could be admitted into evidence." *Id.* at 1327 (citing 10A C. Wright, A. Miller, and M. Kane, FEDERAL PRACTICE AND PROCEDURE § 2722 (2d ed. 1983)). An affidavit submitted in connection with a summary judgment motion which is based upon documents or reports received by the affiant, but about which the affiant has no personal knowledge, contains

inadmissible hearsay. Roloff v. *Sullivan*, 772 F.Supp. 1083, 1088 (N.D.Ind. 1991), *affd*, 975 F.2d 333 (7th Cir. 1992). Each party has filed a motion requesting the court to strike materials that were filed in support of the other party's brief.

Fultz asks the court to strike defendant's affidavits which were also used in the *Baker* litigation. Fultz seems to assert that such affidavits are false and should not be accepted by the court until he has been given an opportunity to (1) depose the aff iant or (2) submit opposing affidavits from the plaintiffs in the *Baker* litigation. As to the first of these arguments, a party's disagreement with the content of affidavits relied on by an opposing party does not constitute a sound basis on which to disregard those affidavits as not complying with the requirements of Rule 56(e). A contrary ruling would leave a court considering a motion for summary judgment solely with facts agreed upon by the parties; the mission of summary judgment, however, is the more ambitious and useful one of adjudicating prior to trial claims on which "there is no genuine issue," and thereby eliminate such claims from trial. Whether the absence of a genuine issue is because of a non-movant's agreement or the simple lack of competent evidence is of no consequence to Rule 56(c).

Fultz also contends that he should be given an opportunity to (1) depose the affiants or (2) submit opposing affidavits from the plaintiffs in the *Baker* litigation. Rule 56 contemplates that parties will be afforded adequate time to conduct necessary discovery. *Banco de Credito Indus. v. Tesoreria General*, 990 F.2d 827, 838 (5th Cir. 1993), *cert. denied, 114 S.* Ct. 877 (1994). The

circumstances of this case do not suggest that Fultz has been denied adequate time and opportunity to conduct discovery to position himself to effectively oppose Mansanto's motion for surnmary judgment. Fi I-S to, there h been no limitation on the scope of discovery in this action. The court also finds that there has been reasonable time for discovery. This action has been pending for over 16 months. Apart from their own research, it should have been quite evident to the parties since the court's ruling on the dispositive motions of other defendants on January 21, 1999, that the holding in *Baker* would have a significant, perhaps even a controlling, impact on the case. Monsanto's motion for summary judgment was filed on February 12, 1999.

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Fultz was given through March 23,1999, in which to respond. If Fultz required additional time for discovery, he should have provided the court with an affidavit under Federal Rule of Civil Procedure 56(f), asking for more time before the court ruled on the summary judgment motion.

) (citing *Karazanos v. Madison Two Assocs.*, 147 F.3d 624, 626 (7th Cir. 1998), and *Brown v. Ameritech Corp.*, 128 F.3d 605, 608 (7th Cir. 1997)). The purpose of Rule 56(f) is to provide a safeguard against a premature grant of summary judgment. *King v. Cooke*, 26 F.3d 720, 726 (7th Cir. 1994); 1OA C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2740 (1983). Fultz had ample opportunity to conduct discovery in this case, and his present request for additional time does not demonstrate "how postponement of a ruling on the motion will enable him, by discovery or other means, to

rebut [Monsanto's] showing of the absence of a genuine issue of fact." *United States v. On Leong Chinese Merchants Assoc. Bldg.*, 918 F.2d 1289, 1295 (7th Cir. 1990), *cert. denied*, 502 U.S. 809 (1991) (citation omitted). Fultz' motion to strike is therefore **denied.**

Monsanto has moved the court to strike or ignore the "mass of unauthenticated and unverified documents" which Fultz filed with his opposition of Monsanto's motion for summary judgment. The court agrees that the vast majority of the documents submitted by Fultz are items such as SEC reports, EPA policies, other articles and reports obtained through the Internet, and Westinghouse contracts and shipping documents relating to the clean-up of PCB contamination--which relate to the dangers of PCBs but do not relate to the specific issues presented in Monsanto's motion for summary judgment-are unauthenticated and must be disregarded. However, the affidavits submitted by Fultz shall not be stricken or ignored; to the extent the contents of those affidavits satisfy the personal knowledge requirement of Rule 56(e) and set forth specific facts, they are properly before the court in conjunction with Monsanto's motion. Accordingly, Monsanto's motion is **granted in part and denied in part**, consistent with the foregoing.

11. Findings of Fact and Conclusions of Law

A. Findings of Fact

The court now makes its findings of fact. The findings are those as to which there is no genuine factual dispute or, if there is such a dispute, are those most favorable to Fultz as the non-moving party.

1. Fultz worked at Westinghouse's plant in the electrical power transformers division in Muncie, Indiana from 1966 until 1994.[1]

2. Monsanto is a Delaware corporation with its principal place of business in St. Louis, Missouri.

3. Monsanto provided Westinghouse with two heat transfer fluids called Therminol FR-1 and Therminol FR-2, which contained PCBs. The last delivery of Therminol FR-2 to the Muncie plant was in January 1970. The last delivery of Therminol FR-1 to the Muncie plant was in January 1971.

4. In 1973, Westinghouse flushed the PCB-containing Therminol from the heat transfer system and thereafter used a heat transfer fluid that did not contain PCBs.

5. Monsanto sold Therminol in bulk to Westinghouse for use as a heat transfer fluid and delivered the Therminol in 55-gallon drums.

6. Monsanto placed a warning label on each drum of Therminol supplied to Westinghouse. The

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[1] Westinghouse Corp. was the predecessor to CBS Corp., which was a defendant in this action until January 21, 1999, when the court granted CBS'motion to dismiss.

warning label stated "Caution! Contains chlorinated hydrocarbons. Avoid prolonged breathing of vapors or mists. Avoid contact with eyes or prolonged contact with skin. If skin contact occurs, remove by washing with soap and water. Following eye contact flush with water. If clothing becomes soaked with fluid, launder before wearing again."

7. Westinghouse had to remove the Therminol from the drums in order to use it, and there was no way to label the fluids themselves.

8. Once Monsanto delivered the Therminol to Westinghouse, Monsanto had no control over its handling or use. Monsanto had no control over the safety and handling communications Westinghouse made to its employees. Westinghouse made its own decision with respect to such issues.

9. Fultz alleges repeatedly in his first amended complaint that Westinghouse was fully aware, both long before and during Fultz' employment, of the hazardous properties of PCBs.

10. Westinghouse developed its own product, Inerteen, a PCB dielectric fluid, for use at its Bloomington, Indiana plant, after seventeen years of its own research.

11. Westinghouse had its own research and medical departments and undertook toxicity studies of PCBs as early as 1938. In 1947, the Westinghouse medical department provided handling instructions to its plants

for Inerteen. Westinghouse prepared its own Material Safety Data Sheets for PCBs beginning no later than 1953. Each of these documents discussed safe handling procedures, including the need to avoid excess contact with Inerteen fluid and fumes.

12. In the late 1960's and 1970's, Westinghouse dealt extensively with PCB-related issues. Westinghouse employed many experts on the industrial use of PCBs. In 1971, the federal government formed an interdepartmental task force on PCBs ("Task Force"), to which Westinghouse provided information. The May 1972 report issued by the Task Force addressed a wide range of issues relating to PCBs, including the toxicology of PCBs. The report was received and reviewed by Westinghouse.

13. In 1959, Monsanto specifically warned Westinghouse that "sufficient exposure [to PCB-containing fluids], whether by inhalation of vapors or skin contact, can result in chloracne which ... we must assume could be an indication of more serious systemic injury if the exposure was allowed to continue."

14. From 1959 onward, Monsanto routinely warned Westinghouse of the risks of overexposure to PCBs through Therminol and Inerteen warning labels, Material Safety Data Sheets, published guides, and frequent letters to Westinghouse. In 1971 alone, Monsanto sent Westinghouse eight pounds of reports and publications on PCBs, including animal toxicity studies.

15. Fultz alleges that he was never informed, verbally or in writing, by any Westinghouse administrator, manager or policy that he worked in, around, or with PCBs. He alleges that he was never advised through any corporate policies, right-to-know program, hazard communications, safety practice data sheets, local plant safety meetings or manuals, employee's training manuals, labeling, or other documentation of how to work safely with toxic contaminants of PCBs. Fultz alleges that his employer's official
policy was that the transformer oil used in the Muncie plant was a high grade mineral oil that had no additives, that the Muncie plant manufactured only large power mineral oil transformers, and that no transformers of a type using a dielectric fluid containing PCBs were ever manufactured at the Muncie plant.

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16. Any conclusion of law set forth below, to the extent it represents a finding of fact, shall be construed in that fashion. Similarly, any finding of fact above, to the extent it represents a conclusion of law, shall be treated in that fashion.

B. Conclusions of Law

Based on the foregoing findings of fact, the court now makes the following conclusions of law.

1. This court has subject matter jurisdiction over the claims against Monsanto pursuant to 28 U.S.C. § 1332. Therefore, under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the court applies the substantive law of Indiana.

American Home Assur. Co. v. Stone, 61 F.3d 1321, 1328-29 (7th Cir. 1995).

2. "Under Indiana law, there is no doctrinal distinction between the negligent and strict liability failure to warn actions." *Taylor v. Monsanto*, 150 F.3d at 808. As discussed in *Baker*, under Indiana law, in order to recover in a products liability suit, a plaintiff must demonstrate that the product which allegedly caused his injury was defective. *Baker*, 962 F. Supp. at 1147 (citing Ind. Code. § 33-1-1.5-1 *et seq.* [now Ind. Code § 34-20-1 *et seq.*]). A plaintiff can establish a defect by demonstrating that "the product was defectively designed, defectively manufactured, or that the manufacturer failed to supply adequate warnings or instructions as to the dangers associated with its use." *Hoffman v. E. W Bliss Co.*, 448 N.E.2d 277, 281 (Ind. 1983). In this case, the plaintiff alleges that the products at issue were defective because he was not adequately warned of the dangers associated with the use of PCBs.

3. Indiana law recognizes the "sophisticated intermediary" defense, under which "there is no duty to warn an ultimate user *[i.e.,* Fultz in this case] when the product is sold to a 'knowledgeable or sophisticated intermediary' whom the manufacturer has adequately warned." *Taylor*, 150 F.3d at 808. "Delegation of the duty to warn makes particular sense where the manufacturer cannot control how the intermediary will use the product, and where the form of the product does not easily lend itself to direct labeling." *Id.* (citations omifted). In addition to showing that Monsanto adequately warned Westinghouse, two elements must be

satisfied in order for the sophisticated intermediary doctrine to apply: (1) the intermediary must have knowledge or sophistication equal to that of the manufacturer, and (2) the manufacturer must be able to reasonably rely on the intermediary to warn the ultimate user. *Id.*

4. It is undisputed in this case, given the plaintiff's own allegations in his first amended complaint, the evidence of Westinghouse's long history of vast in-house expertise, and its participation in the federal Task Force concerning PCBs, that Westinghouse had knowledge and sophistication equal to that of Monsanto and that, therefore, Westinghouse was a sophisticated intermediary. See id. at 808-09.

5. There is evidence of record that Monsanto warned Westinghouse countless times about the dangers of PCBs. Monsanto could not label the fluid Therminol directly, and could only label the drums in which it was delivered to Westinghouse. Monsanto had no control over the product's handling or use once it was delivered. This leads the court to the same conclusion upon which it arrived in *Baker* "Given Westinghouse's level of expertise on the chemical properties and hazards of the ... fluids it purchased from Monsanto, it was reasonable for Monsanto to rely upon Westinghouse to warn its employees of the dangers associated with those products." *Baker*, 962 F. Supp. at 1160.

4. Fultz states in his affidavit that he not only was never personally warned by Westinghouse

management or policies, he never was warned through any labeling or other documentation which presumably could have been issued by Monsanto. Even taking Fultz' statements as true, they do not defeat Monsanto's defense in this case. Monsanto has demonstrated that no genuine issue of material fact exists with regard to both elements of the sophisticated intermediary defense. Therefore, Monsanto is not liable under Fultz' products liability theory, even if there is no evidence that Monsanto ever directly warned him. Monsanto discharged its duty by adequately warning Westinghouse. Monsanto's motion for summary judgment on Fultz' products liability and tortious failure to warn claims is granted.

5. Fultz alleges in his amended complaint that Monsanto and Westinghouse conspired to intentionally, knowingly, deliberately, callously, and maliciously poison" him. However, the critical element of any conspiracy, an agreement to commit an unlawful act, *Sanders v. City of Indianapolis*, 837 F. Supp. 959, 963 (S.D.Ind. 1992), is missing in this case. Westinghouse made its own decisions with respect to the handling and use of Therminol. Fultz' conspiracy claim must fail. Monsanto's motion for summary judgment on this claim is granted.

8. Fultz alleges that "Monsanto's intentional and knowing exposure of Plaintiff to injurious levels of PCBs constitutes common law battery." Under Indiana law, a battery is a ... harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent. . . ." Fields *v. Cummins*

Employee Fed'l Credit Union, 540 N.E.2d 631,640 (Ind. Ct. App. 1989)(quoting W. Keeton, ROSSERAND KEETON ON THE LAW OF TORT § 9 (5th ed. 1984)).

"Although it is conceivable that a manufacturer could withhold information to such an extent that the withholding and deceit reach the level of an affirmative act such as battery entails,. . ." Baker, 962 F.Supp. at 1161 (citation omitted), Fultz has not produced any evidence that Monsanto intended to expose him to PCBs. Again, Monsanto sold products to Westinghouse and had no control over the use or handling of those products at the Muncie plant. *See id.* (plaintiff failed to produce evidence demonstrating requisite intent to support a claim of battery). Monsanto's motion for summary judgment on the claim of battery is therefore **granted.**

9. Fultz asserts claims of fraud in the inducement and fraudulent misrepresentation. Each of these claims is based on Fultz' allegation that Monsanto encouraged, ratified, and adopted misrepresentations made by Westinghouse that the workplace was safe. There is no evidence of record that Monsanto made or otherwise adopted any representations or made any misrepresentations to Fultz. Accordingly, Monsanto's motion for summary judgment on Fultz' fraud claims is **granted.**

Ill. Conclusion

For the reasons discussed above, Monsanto's motion for summary judgment is granted. Claims against other defendants were dismissed through the court's Entry of

January 21,1999. Accordingly, final judgment consistent with this Entry and with the Entry of January 21, 1999, shall now issue.

IT IS SO ORDERED.

-Signature Sarah Evans Barker-
SARAH EVANS BARKER, Chief Judge
United States District Court
Date: May 3, 1999

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN FULTZ,
Plaintiff,

Vs. IP 97-2034-C-B/S

ABB POWER LTD. COMPANY, et al.,
Defendants.

JUDGMENT

The court, having this day made its Entry, and having directed the Entry of final judgment,

IT IS THEREFORE ADJUDGED that Monsanto's motion for summary judgment is **GRANTED**, that the motions to dismiss filed by ABB Power, CBS, and ABB ASEA were granted through the Entry of January 21, 1999, and that judgment is entered for the defendants and against the plaintiff in this action.

-Signature Sarah Evans Barker-
SARAH EVANS BARKER, Chief Judge
I United States District Court

Date: *May 3, 1999*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN FULTZ,
Plaintiff,

vs. IP 97-2034-C-B/S

ABB POWER LTD. COMPANY, et al.,
Defendants.

ENTRY DISCUSSING MOTIONS TO DISMISS

This is an action in which the plaintiff sues his former employer, successor corporations and a supplier for injuries suffered by the plaintiff which were allegedly caused by the conduct of the defendants and the conditions which existed in the workplace during the time of the plaintiff's employment. The defendants named in the amended complaint are Monsanto Company, CBS Corporation, formerly Westinghouse Electric Corporation, ABB PowerT&D Company, Inc., and ABB ASEA Brown Boveri Ltd. As used in this Entry, "Fultz" refers to plaintiff John Fultz, "Monsanto" refers to defendant Monsanto Company, "ABB Power" refers to defendant ABB Power T&D Company, Inc., "ABB ASEA" refers to defendant ABB ASEA Brown Boveri Ltd., and "CBS" refers to defendant CBS Corporation, formerly Westinghouse Electric Corporation.

Defendants ABB ASEA, ABB Power, and CBS seek resolution of the claims against them through their

motions to dismiss. On November 3, 1999, the court converted the motion to dismiss filed by ABB Power and CBS as a motion for summary judgment. Fultz has opposed these motions.

Whereupon the court, having considered the amended complaint, the defendants' answers, the defendants' motions, the plaintiff's responses, and the expanded record, now **grants** the motions to dismiss filed by ABB Power, CBS, and ABB ASEA.

Background

This action was removed to this court from Delaware superior court, Delaware County, Indiana, and this court has jurisdiction pursuant to 28 U.S. C. § 1332, by reason of the parties' diversity of citizenship and the amount in controversy. Plaintif's amended complaint alleges that he was intentionally exposed to toxic polychlorinated biphenyls (PCB's) during the course of his employment at CBS and ABB Power and that as a result, he suffered permanent disabling injuries.

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He also asserts against each of the moving defendants claims of battery, fraud in the inducement, fraudulent misrepresentation, and resitution. He seeks compensatory and punitive damages.

Claims Against ABBj Power and CBS

Worker's Compensation Act

ABB Power and CBS argue that the plaintiff's amended complain should be dismissed because it is barred by the exclusive remedy provision of the

Indiana Worker's Compensation Act ("WCA"), Ind. Code § 22-3-1-1 *et seq.* The WCA provides the exclusive remedy for employment-related personal injuries or death which occur "by accident." *See* Ind. Code § 22-3-2-6; *Lawson v. Raney Mfg., Inc.*, 678 N.E. 2d 122, 124-24 (Ind.App. 1997). The Indiana supreme court interpreted this provision in three cases decided in 1994: Baker v Westinghouse electric corp., 637 N.E.2d 1271 (Ind. 1994); *Foshee v. Shoney's Inc.*, 637 N.E.2d 1277 (Ind.1994); and *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282 (Ind. 1994). *See also Tacket v. General Motors corp., Delco Remy Div.*, 93 F.3d 332, 334 (7th cir. 1996) (discussing all three cases).[1]

Fultz argues that the exclusivity provision does not bar his claims because he alleges that his injuries were caused by intentional torts, and were, therfore, not "by accident." In order for intentional torts to fall beyond the reach of the Act, the employer must have intended to injure the employee. *Baker*, 637 N.E.2d at 1275. "[M]ere employer negligence or recklessness is not sufficient...." *Id.* (citation omitted). "[N]othing short of deliberate intent to inflict an injury, or actual

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[1] the Indiana courts treat such issues as matters of jurisdiction, and this court has on occasion treated them in that way. However, the Seventh Circuit has treated such issues instead as a part of the merits of the claim, so that this court should not address the issue under Fed. R. Civ. P. 12 (b)(1) (challenge to subject matter jurisdiction). *See Tacket*, 93 F.3d at 334.

knowledge that an injury is certain to occur, will suffice." Id.

The moving defendants argue that Fultz's conclusory allegation that they "intended to inflict Plaintiffs injury with the'actual knowledge that an injury is certain to occur"' is not sufficient. The court agrees. "A naked allegation of an intentional tort is not adequate to permit a claimant to avoid the exclusive remedy provision of the Work[er]'s Compensation Act." Tribbett v. Tay Mor Industries, Inc., 471 N.E.2d 332, 333 (Ind.App. 1984). Moreover, as described above, the standard concerning "intentional" injuries as established by the Indiana courts is exceedingly stringent. Indeed, the *Baker* court expressly stated that an employer may not be sued in tort even if it "knew that the injury was substantially certain to occur." Id. at n.5. Fultz's allegations, which essentially are that the moving defendants exposed him to PCB's and knew that the chemicals *could* cause harm, simply do not place Fultz's claims outside the scope of the WCA. His claims against his former employers, ABB Power and CBS, are, therefore, dismissed.[2]

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[2] Fultz argues that his fraudulent misrepresentation claim is not barred by the WCA. In support *of* this contention, Fultz cites *Baker v. American States Ins. Co., 428* N.E.2d *1342* (Ind.App. *1981).* However, Fultz misinterprets the holding *of* that case. In *Baker v. American States,* the plaintiff sought damages from his employer's worker's compensation insurance carrier for harm he allegedly suffered as the result of knowing misrepresentations

B. Occupational Diseases Act

ABB Power and CBS also argue that even if Fultz's allegations satisfied the intentional injury standard of the WCA, because Fultz allegedly suffers from a disabling disease arising out of his employment, his claims are barred by the exclusive remedy provision of the Indiana Occupational Diseases Act. Ind. Code § 22-3-7-6 ("ODA"). As this court has explained in other cases, when enacting the WCA and ODA,

the legislature made a conscientious choice to provide individuals who are injured in the course of their

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made by the carrier's adjusters concerning the level of his visual impairment.

In *Baker*, unlike here, the plaintiff was not "attempting to recover damages against his employer for his [eye] injury which arose in the course of his employment. Instead, he sought damages against the insurance carrier for harm that arose *after* the plaintiff had been disabled from working for a period of time. *Id.* at 1347. Indeed, the court made clear that "Baker could not have brought a lawsuit against his employer for damages for his eye injury. Ind. Code § 22-3-2-2." *Id. Baker* does not stand for the proposition that all fraudulent misrepresentation claims skirt around the exclusivity provision of the WCA. Fultz alleges misrepresentations which occurred during his course of employment, not after. Accordingly, his fraud claims (fraud in the inducement and fraudulent misrepresentation) are barred by the WCA.

employment with compensation which, though probably less than what they would receive if they prevailed in litigation, is guaranteed. In return for this payment, employers are relieved of burdensome litigation because the remedy under both the Act and the ODA is exclusive.

Unlike the WCA, the exclusivity provision of the ODA does not contain the "by accident" language. The Indiana Supreme Court in *Baker* held that because of that omission, there is no intentional tort exception in the ODA. 637 N.E.2d at 1276. In order for a claim to fall within the exclusive remedy provision of the ODA, the occupational disease must be one arising out of and in the course of employment (causal requirement), and the employee must suffer disablement or death (loss of wage earning ability requirement). Hurd, 908 F.Supp. at 609.

Throughout his amended complaint, Fultz alleges that it was his employment that caused him to be exposed to PCB's at CBS and ABB Power. Although Fultz argues that he has an injury and not a disease, he alleges in his amended complaint that he suffers from "acute and latent disease conditions" including cancer, nerve damage, systemic disorders, chemically. induced arthritis, and damaged immune system. In addition, he alleges that his exposure to PCB's caused the loss of his ability to support himself and his family. Fultz's claims fall squarely within both prongs of the exclusivity provision of the ODA, and therefore, his claims against ABB Power and CBS must also be dismissed pursuant to that statute.

III. Status of ABB ASEA

In addition to joining in the motion filed by CBS and ABB Power, ABB ASEA argues that the claims against it should be dismissed because (1) Fultz has not sought leave to add ABB ASEA as a defendant pursuant to Rule 21 of the *Federal Rules of Civil Procedure,* (2) it has not been served in this case and the court has no personal jurisdiction over it, and (3) it is not an employer of plaintiff and therefore cannot be liable for any alleged exposure to PCB's caused by an employer's alleged failure to provide a safe environment. ABB ASEA asserts that it is merely a Swiss stock holding company, separate from ABB Power. With its motion, ABB ASEA filed an affidavit of Stuart Saltman, Assistant General Counsel for ABB Power, stating that Fultz was an employee of ABB Power and was not employed in any capacity by ABB ASEA.

In Fultz's response to ABB ASEA's motion, he sought leave to add ABB ASEA as a defendant. He argues that he named ABB ASEA as a defendant because in 1989, ABB ASEA and Westinghouse established joint ventures known as Westinghouse ABB PowerT&D Company. This undertaking, assumming it to have occurred, did not change the identity of Fultz's employer, and did not transfer any employer-based liability to ABB ASEA or Westinghouse ABB Power T&D Company.

In addition, as the discussion in Part 11 of this Entry shows, Fultz has not asserted a viable claim of employer liability for the toxic exposure he alleges. Accordingly, Fultz's request to add ABB ASEA as a defendant would be an act of futility and is **denied.** *Moore v. State of Indiana,*

999 F.2d 1125 (7th Cir. 1993); *Williams v. United States Postal Service*, 873 F.2d 1069, 1072 (7th Cir. 1989) (while leave to amend shall be freely granted where warranted, "this principle is inapplicable where the amendment would prove futile"). Consistent with this, the claims asserted by Fultz in his amended complaint against ABB ASEA are **dismissed.**

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Conclusion

Based on the foregoing, the motions to dismiss filed by ABB Power, CBS, and ABB ASEA are **granted.** Fultz' request to add ABB ASEA as a defendant is **denied.** No partial judgment shall issue at this time as to the claims which are dismissed through this Entry. The disks in conjunction with the pending motions shall be returned to the parties tendering the disks.

IT IS SO ORDERED.

-Signature Sarah Evans Barker-
SARAH EVANS BARKER, Chief Judge
United States District Court
Date: January 21, 1999

Copies to:
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Roseanne Oliver

Cahill Christian & Kunkle
224 South Michigan Avenue Suite 1300
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Michael Rosiello
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN FULTZ,
Plaintiff,
Vs.
IP 97-2034-C-B/S
MONSANTO CORPORATION,
Defendants.

ENTRY DISCUSSING SELECTED MATTERS

Based on its review of the filings and rulings heretofore made in this case, and based &!so on the document filed by the plaintiff on February 1, 1999, the court makes the following rulings

1 . The plaintiff's document filed on February 1, 10.99, is construed as a request to reconsider the dismissal of certain claims and to proceed with a further amended complaint. The court finds no viable basis on which to reinstate the claims which were dismissed through the Entry issued on January 21,1999. The proposed expansion of the plaintiffs claims in this action would also not be useful, because his proposed RICO claims are time-barred, and the plaintiff may not use this forum and proceeding in which to commence a criminal prosecution or investigation of the defendants.

2. A pretrial conference (involving the plaintiff and Monsanto Corporation) will be held by Magistrate Judge Shields on March 11, 1999, at 3:00 p.m. The purposes of the conference shall include the following: (1) reviewing the status of the case; (ii) discussing the plaintiff s claims;

and (iii) discussing the further development of the case for trial or other disposition. The conference should be expected to last forty-five (45) minutes, and the parties are encouraged to file specific agendas for the conference. **IT IS SO ORDERED.**

Signature Sarah Evans Barker-
SARAH EVANS BARKER, Chief Judge
United States District Court
Date: February 3, 1999

STATE OF INDIANA

COUNTY OF DELAWARE

IN THE DELAWARE SUPERIOR COURT
SS: 1997 TERM
CAUSE NO.
18D019712-CP 201

JOHN F. FULTZ
Plaintiff,

Vs.

ABB POWER LTD COMPANY,
MONSANTO CORPORATION,
WESTINGHOUSE ELECTRIC CORPORATION
Defendant

FILED
Clerks Office
Delaware CO,
DEC 01 1997
-Signature Karen D. Wenger-
Clerk

COMPLAINT

Plaintiff, John F. Fultz, comes now for the purpose of a complaint for damages against Defendants ABB Power LTD, Monsanto Corporation, Westinghouse Electric Corporation., allege and state:

1 This is an action for damages for injuries suffered by Plaintiff, John F. Fultz as a result of the misapplication of and their resulting exposure to polychlorinated biphenyls (PCB'S) and other chemicals.

2 Monsanto Corporation is a corporation with its corporate headquarters in Saint L Missouri that employs more than 100 employees. Monsanto is a manufacturer of chemicals.

3 Westinghouse Electric Corporation is a corporation with its corporate headquarters in New York which employs more than 100 employees.

4 The Plaintiff John F. Fultz residents of 714 South Lancaster Road, Muncie, Indiana in County of Delaware for more than (5) Five years.

5 ABB Power LTD Corp, is a Delaware Corporation with it corporate headquarters in Switzerland. ABB facility is located at 3500 South Cowan Road Muncie Indiana.

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6 In 1989 ABB purchased the worldwide power transmission and distribution operations of Westinghouse Electric Corporation.

7 ABB is a corporation that employs more than 100 Employees.

8 Monsanto sold the chemicals that were used in the manufacturing of power transformers in the Muncie plant were John F. Fultz worked.

9 John F. Fultz worked exposed to these chemicals without proper equipment and warnings until Januarv 1, 1994.

11 Polychlorinated biphenyls were banned in 1977 in the United States and Canada.

12 The long-term risks of even low-level exposure to PBCs are considered significant enough to warrant concerted action to reduced further, their environmental levels.

13 Both Oak Ridge and the EPA has determined that for humans, long-term PBC exposure is associated with cancer or human reproductive effects.

14 The federal government outlawed the manufacture of PCBs, along With passing the Hazardous Waste Management Act of 1979.

15 Beginning approximately In 1990 or earlier John F. Fultz began experiencing various health problems. including neurological symptoms such as muscle weakness and unnatural fatigue. In addition John has experienced many physical and physiological problem related to his exposure to PCBs.

16 Dr. Michael T. Johnson was the first doctor to find a connection to John's problems and his exposure to PCBs.

17 Dr. Michael T. Johnson suggests that John's health problems were consistent with exposure to PCBs, this conversation with Dr. Johnson in 1996 . was the first time that John learned that his exposure to the chemicals might be the cause of his health problems.

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18 John continue to suffer serious adverse effects from his exposure to the chemicals ABB and Westinghouse used where John worked.

19 In addition, John's life has been dramatically affected by the chemicals and the possibility of other adverse reactions because of the long term exposure to PCBs.

PRAYER FOR RELIEF

Plaintiff request that judgment be entered in his favor against the defendants to pay damages sufficient to compensate plaintiff for : (1) physical injuries. (2) economic losses: and (3) pain and suffering. In addition. Plaintiff respectfully request punitive damages in an amount sufficient to punish Defendants for the exposure

of highly toxic chemicals, and for all other just and proper relief.

JURY REQUEST
Plaintiff here bv request a trial by jury.

Respectfully submitted
-Signature John F Fultz-
John F. Fultz

FILED
Clerks Office
Delaware CO. Indiana
DEC 01 1997
-Signature Karen D. Wenger-
CLERK
-Seal-
Official Certified Copy
True & Complete
Date 12-18-97
-Signature Karen D. Wenger-
Clerk of Delaware County

STATE OF INDIANA

IN THE DELAWARE SUPERIOR COURT
SS: 1997 TERM

COUNTY OF DELAWARE

CAUSE NO.
18D019712-CP-201

JOHN F. FULTZ
Plaintiff,

V.

ABB POWER LTD COMPANY,
MONSANTO CORPORATION,
WESTINGHOUSE ELECTRIC CORPORATION
Defendants

COPY OF DEFENDANTS' NOTICE OF REMOVAL

Pursuant to 28 U. S.C. § 1446 (d), Defendants ABB Power T&D Company Inc., Monsanto Co. and CBS Corp., formerly Westinghouse Electric Corporation file with the Clerk of the Court a true and complete copy of the Notice of Removal of this action from the Delaware Superior Court, Delaware County, Indiana, which was filed with the Clerk of the United States District Court on this 23d day of December, 1997.

-Signature Michael Rosiello-
Michael Rosiello (#6203-49)
Kenneth J. Waite (# 19609-49)
BARNES & THORNBURG 11 South Meridian Street
Indianapolis, IN 46204-3556
(317) 236-1313 Attorneys for Monsanto Co.
INDS07 KJW 178808

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document has been served this 23rd day of December 1997, by first class United States Mail, postage prepaid and properly addressed to the following Pro Se counsel of record:

John F. Fultz
714 S. Lancaster Rd.
Muncie, IN 47302

-Signature Kenneth J. Waite-
Kenneth J. Waite

INDS02 KJW 179808
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